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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 103.

MINNESOTA STATE LIBRARY.

H. C. CRARY ET AL., PLAINTIFFS IN ERROR,

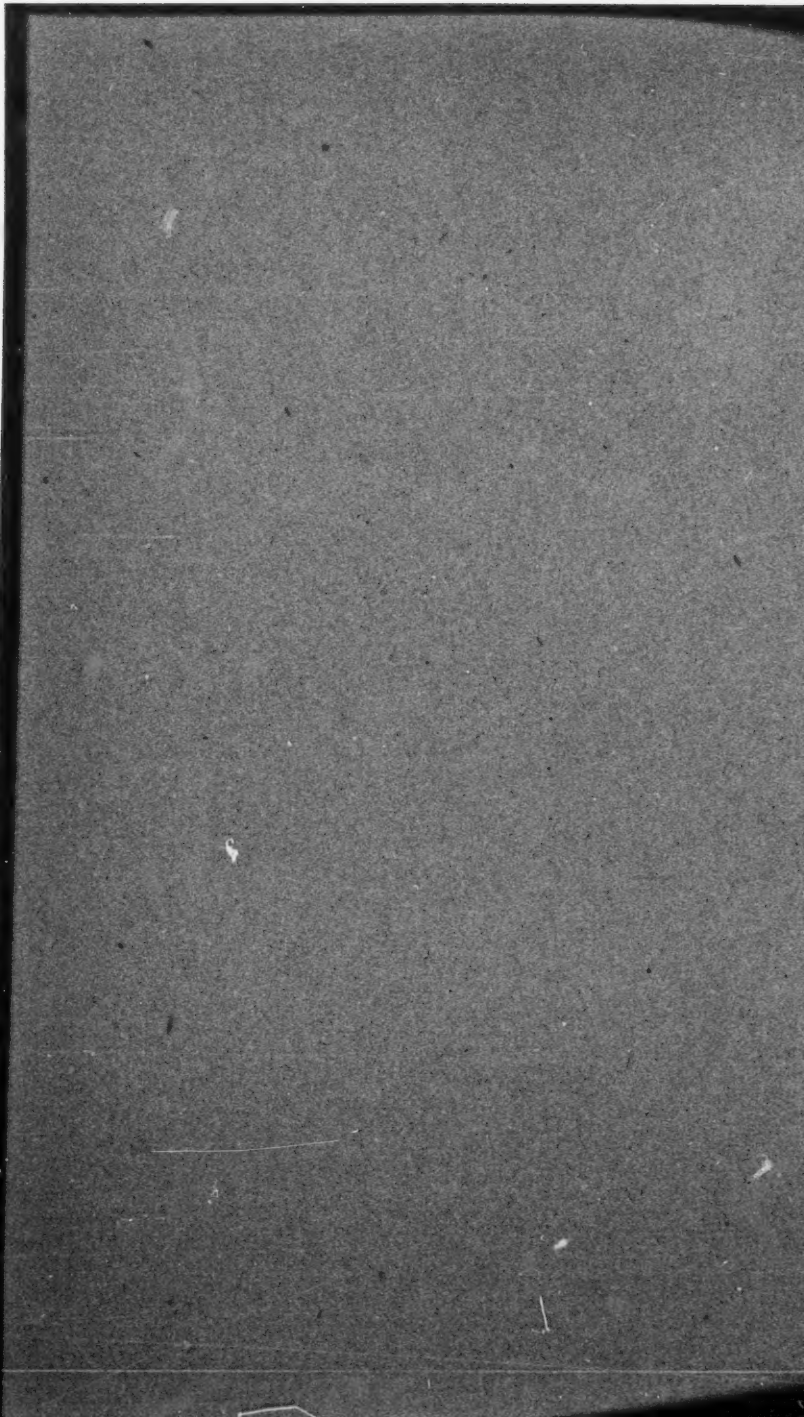
vs.

BENJAMIN H. DYE AND WILLIAM B. CHILDERS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED SEPTEMBER 24, 1906.

(20,371.)



(20,371.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 406.

H. C. CRARY ET AL., PLAINTIFFS IN ERROR,

vs.

BENJAMIN H. DYE AND WILLIAM B. CHILDERS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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a The United States of America to Benjamin H. Dye and Wm. B. Childers, Greeting:

You and each of you are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States of America to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Supreme Court of the Territory of New Mexico, wherein, H. C. Crary *et als.*, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as — the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this the 29th day of August, A. D., 1906.

[Seal Supreme Court, Territory of New Mexico.]

WILLIAM J. MILLS,
Chief Justice of the Supreme Court,
Territory of New Mexico.

Received copy of above this 30″ day of Aug. 1906.

W. B. CHILDERS,
Attorney for Def'ts in Error.

b UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court before you, wherein H. C. Crary, *et als.*, were appellants, and Benjamin H. Dye, *et al.*, were appellees, a manifest error hath happened, to the great damage of said appellants, as by *his* said complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date hereof, in the said Supreme Court at a term to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States of America, this the 29th day

of August, in the year of our Lord, one thousand nine hundred and six.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

c TERRITORY OF NEW MEXICO, *Supreme Court, ss:*

I, the undersigned Clerk of the Supreme Court of the Territory of New Mexico, do hereby make return to the within writ of error by transmitting herewith to the Supreme Court of the United States, a true copy of the record and proceedings in the cause therein mentioned as per præcipe for writ of error here in this office filed, under my hand and the seal of the Supreme Court of the Territory of New Mexico.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

1 Be it remembered, that heretofore, *on* to wit: at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January, A. D., 1903, the same being the 7th day of January, A. D., 1903, on the eighth day of the said regular term, the same being the sixteenth day of January, A. D. 1903, the following among other proceedings were had and entered of record in a certain cause pending in the said Supreme Court of the said Territory of New Mexico entitled Benjamin S. Dye, *et al.* appellants *vs.* H. C. Crary, *et al.* appellees which said entry was and is in words following to wit:

No. 988.

BENJAMIN H. DYE ET AL., Appellants,
vs.
H. C. CRARY ET ALS., Appellees.

Appeal from District Court, Socorro County.

This cause coming on to be heard upon the transcript of record, assignment of errors and briefs of counsel, is argued by William B. Childers, Esq., for appellants and H. B. Fergusson, Esq. for appellees and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, *on* to wit, at a regular term of the Supreme Court of the Territory of New Mexico begun and held on the first Wednesday after the first Wednesday of January, A. D., 1904 the same being the sixth day of January A. D., 1904, on the twenty-first day of the said Regular term, the same being the 3rd day of Sep-

tember, A. D., 1904, the following among other proceedings were had and entered of record in the said cause above entitled and Numbered 988 as follows, to wit:

2 No. 988.

BENJAMIN H. DYE ET AL., Appellants,
vs.
H. C. CRARY ET ALS., Appellees.

Appeal from District Court, Socorro County.

This cause having been ordered to be reargued, by the court upon its own motion, and again coming on for hearing, upon the transcript of record, assignment of errors and briefs of counsel, is argued by Willia- B. Childers, Esq., for appellants, and H. B. Fergusson, Esq. for appellees, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, *on* to wit, on the twenty-eight day of the said regular term, the same being the seventeenth day of October, A. D., 1904, the following among other proceedings were had and entered of record, following to wit:

No. 988.

BENJAMIN H. DYE ET ALS., Appellants,
vs.
H. C. CRARY ET ALS., Appellees.

Appeal from District Court, Socorro County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Baker, Associate Justices Pope, Parker and Mann, concurring, Chief Justice Mills and Associate Justice McFie, dissenting, reversing the judgment of the court below, for reasons stated in the opinion of the court on file; It is therefore considered and adjudged by the court that the judgment of the District Court in and for the county of Socorro, whence this cause came into this court, be and the
3 same hereby is reversed and this cause hereby is remanded to the said district Court with instructions to take further proceedings in accordance with the opinion of the court on file. It is further ordered and decreed by the court that the said appellants do have and recover of the appellees herein their costs in this behalf expended for which execution may issue.

And afterwards, *on* to wit at the said regular term of the said Supreme Court of the Territory of New Mexico, on the twenty-

eighth day of the said term, the same being the seventeenth day of October, A. D., 1904, the following among other proceedings were had and entered of record, following to wit:

No. 988.

BENJAMIN H. DYE ET AL., Appellants,
vs.
H. C. CRARY ET ALS., Appellees.

Appeal from District Court, Socorro County.

It is ordered by the court that the appellee herein do have thirty days from this date within which to file motion for rehearing herein.

And afterwards, *on* to wit, on the sixteenth day of November, A. D., 1904, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a motion for a rehearing in the above entitled cause, which said motion for a rehearing was and is in words and figures following to wit:

4 In the Supreme Court of the Territory of New Mexico.

No. 988.

BENJAMIN H. DYE ET AL., Appellant-,
vs.
H. C. CRARY ET AL., Appellees.

Appeal from District Court, Socorro County.

Motion for a Rehearing.

Comes now the appellees in this cause and move the Court to grant them a rehearing, and for grounds of this motion respectfully show to the Court:

I.

The Court, in its opinion, refers to the words "original writ" mentioned in sections 2690, 2696 and 2697 of our Compiled Laws as if used in contra-distinction to "alias writs," and questions whether the legislature did not intend to prohibit by the use of the words, "original writs" the issuance of alias writs.

We respectfully submit that this is error. Wade on Attachment, Vol. 1, Sec. 157 *et seq.*, lays down the distinction between original attachments and ancillary attachments,—that an original attachment is one where the suit is begun by attachment, the declaration and the affidavit and bond for attachment being filed simultaneously; while an ancillary attachment is one filed at any time after the main suit is commenced, but before judgment.

Our attachment statute, prior to section 2721, deals only with original attachments; while sections 2721 and 2722 define and provide for ancillary attachment suits,—providing, among other things, that in all cases of ancillary attachment such "suit must thereafter proceed in all respects as if it had been commenced originally by attachment."

So, if our statute, whether directly or otherwise, authorizes
5 alias writs of attachment, the one class would properly be called "alias original writs," and the other, "alias ancillary writs." And if an alias writ could issue in an original attachment, so also, under section 2722, an alias writ could issue in an ancillary attachment. And the Court fails to construe these three sections, which, of course, must be construed together:—

Sec. 2871, making the common law the rule of practice and decision.

Sec. 2697, providing that writs of attachment shall be issued and returned in like manner as ordinary writs of citation.

Sec. 2727, providing that from the time of the issuing of the order of attachment, the court shall be deemed to have acquired jurisdiction.

Under section 2871, the right is conferred on our courts to issue alias, and even pluri-s, writs of citation. Nowhere else do our statutes give that *wright*. And under section 2697 it is clear to my mind that the jurisdiction is given our courts to issue alias writs of attachment, whether original or ancillary.

This conclusion is greatly strengthened by section 2727, defining the exact point where, in attachment suits, begins jurisdiction. Jurisdiction of what? Not of the person; for in the case of a non-resident, that may not be, and constructive service by publication is yet to be had. Clearly, jurisdiction to subject the property of the absent debtor, within the Territorial jurisdiction of the court, to the judgment to be rendered; and whether such property shall be seized by the court by the first writ or by an alias writ, is put in the discretion and *juris* of the court by section 2727.

The Court would see to it that none of the evils, pointed out as possible, by the Court in its opinion, ensued. Such evils are not allowed in many states where alias writs are expressly sanctioned. And several highly respected courts that have no statute such as we
have in section 2681, 2696 and 2727, have held that it is
6 within the inmate power of the Court to issue alias writs of attachment.

II

The Court, on page 7 of its opinion, inadvertently errs in stating what the record in the attachment suit, collaterally attacked here, shows, using these words:

"The record also shows that on the 11th day of May, 1898, an alias writ of attachment was issued, and that no additional or other affidavit or bond was filed."

This is erroneous, and is most prejudicial to the rights of the appellees. That statement by the court is tantamount to saying that the record *affirmatively* shows that no new or additional affidavit and

bond were filed preliminary to the issuance of the alias writ. The record is wholly silent on this point, and I earnestly request the court to inspect the record again.

If the court is right, that the record affirmatively shows no new or additional affidavit and bond were filed, then the case of Voorhees *vs.* Bank in 10 Peters is not in point in favor of appellees; but if the record is silent on that point, then said case is certainly conclusive in favor of appellees; because that case holds, the record being silent as to the existence of necessary jurisdictional steps prior to the issuance of the writ, that it will be conclusively presumed that such steps were lawfully taken.

Voorhees *vs.* Bank of the United States, 10 Peters, 469.

III.

The Court erred in its statement of the points considered by the Supreme Court of the United States in its decision of said case in 10 Peters, and in its application of said case in this case. This Court, on page 7 of its opinion, states those points as follows:—

"The five objections, in short, were: 1; that the affidavit was not in proper form: 2; that there was not sufficient notice given for sale: 3; that the defendants were not three times called as provided by law: 4; that the sale was made before the expiration of the
7 time of notice; and 5; that the return of the auditor showed the deed executed to a person other than the purchaser."

Such is the statement by this Court. The statement of the five points, made by the Supreme Court of the United States, is found in its opinion in said case (at page 47), 10 Peters, and is as follows:—

"1. By the 1st section it provides that an affidavit shall be made and filed with the clerk before the writ issues, and, if this is not done, the writ shall be quashed, on motion; no such affidavit is found in the record.

"2. The 15th section directs three months' notice to be given by publication in a newspaper of the issuing of the attachment, before the judgment shall be entered; the 11th section also prescribed that fifteen days' notice of sale shall be given by the auditors; neither of which appears by the record to have been done.

"3. By the proviso to the 8th section, the defendant must be three times called, at each of the three terms preceding judgment, and make default, which defaults shall be recorded by the clerk; no entry is made of such default at the December Term, 1807.

"4. By the 11th section, the auditors are prohibited from sitting till the expiration of twelve months from the return of the writ; whereas, the order issued before; and it does not appear when the sale was made.

"5. The return of the sale by the auditors shows a sale to one person and a deed to others; not in any mode connected with the record."

The highly injurious error of this Court is in its statement of the first point, viz: That the United States Supreme Court stated in its opinion in the 10 Peters case, that the affidavit was not in proper

form, and thus evades the force of that decision, which is that, as
the record in the case attacked contained no such affidavit
8 as the Ohio statutes prescribed, yet the law, on collateral at-
tack, conclusively presumed in favor of the judgment attacked, that such affidavit had been duly made.

So the record in the attachment suit collaterally attacked here, is silent as to the filing of a new or additional or alias bond and affidavit for attachment, before the alias writ was issued, and therefore, this Court must under the authority of the 10 Peters case, hold that, as the Court in the attachment case of Taliaferro *vs.* Dye, collaterally attacked here, recognized the validity of the alias writ and ordered the property seized thereunder sold, this Court must hold, in the utter silence of the record on the subject, that the existence of such new or additional or alias bond and affidavit is conclusively presumed.

Such is the exact decision in Voorhees *vs.* the Bank, 10 Peters 469, and it cannot be denied; in fact, this Court impliedly admits, that had such alias affidavit and bond been filed and been found in the record, the attachment sale of the property in dispute here would have been valid.

In Cooper *vs.* Reynolds, 10 Wall. 318, near top of page 320, it is said:

"Whether the writ should have been issued simultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction."

This Court decides that no jurisdiction of the *rem* is acquired by the Court under our statute, until the *res* is actually seized under the process of the court; and quotes Cooper *vs.* Reynolds as so holding under a similar statute. We do not controvert that position; and it is beside the point at issue in our case.

The case of Cooper *vs.* Reynolds was relied upon by appellees as holding that a defective publication was not a jurisdictional defect, and could not be reached in a collateral attack. It touches no other
question in our case save that, at said page, it quotes ap-
9 provingly Voorhees *vs.* The Bank in referring to the presumption indulged in favor of judgments collaterally attacked.

Besides, in our case, the property sold *was* seized and subject to the dominion of the court, under a writ duly issued, under the seal of the court, delivered to the proper officer, and by him executed and returned into court. The only question as to such writ being, whether, not having "been issued simultaneously with the institution of the suit," and having been denominated "an alias writ,"

1. Was it authorized by our attachment statute?

2. Was it within the inherent power of the Court to issue it, without special statutory authorization?

3. Was the lower court's decision that the seizure of the compromise mine under such alias writ was a valid levy, such an error, if error, as can only be corrected by a direct attack, and was such an error, if error, as cannot be reached in a collateral attack?

IV.

The Court failed to decide the point relied upon by appellees, that, even if our statute does not authorize an alias writ, and even if it is not within the inherent power of the Court to issue an alias writ, yet still, as the Court had jurisdiction of the defendant, under service by publication, and had jurisdiction of the subject matter (the collection of a debt of a non-resident from his property in the Court's territorial jurisdiction), and had jurisdiction of the whole case under section 2727 of our attachment statute, its decision that the levy of such alias writ was a valid seizure of defendant's property, that such an error, if error, is not such as can be availed of by a collateral attack.

We confidently rely upon the following authorities in support of the proposition, that, the court, in the case of Taliaferro *vs.* Dye, having decided that the levy of the alias writ of attachment upon the property of the defendant was a valid seizure of the *rem*, and such property having been sold to satisfy the judgment debt, such decision of the Court, in this collateral attack can be corrected, if erroneous, only by direct attack and cannot be reversed in any collateral attack. Graff *vs.* Louis, 71 Fed. 291; Manson *v.* Duncanson, 166 U. S., 533; also Supreme Court Reporter, Vol. 17, p. 697.

V.

The doctrine of presumptions indulged in to uphold judicial sales, which doctrine this Court, in its opinion, wholly ignores, under the Voorhees *vs.* The Bank case, in 10 Peters, also elaborated in Black on Judgments, section 270, makes the alias writ in this case a valid writ, by conclusively presuming that a proper alias affidavit bond *were* filed before the alias writ was issued, the record being silent on that subject.

Wherefore appellees pray that a re-hearing be ordered in this case, to the end that the Court may further consider of its final opinion herein. Appellees also ask leave to file a brief in support of this motion.

Respectfully submitted.

(Signed) H. B. FERGUSSON,
Attorney for Appellees.

And afterwards, *on* to wit, on the twenty-ninth day of the said regular term, of the said Supreme Court, the same being the twenty-sixth day of November, A. D., 1904, the following among other proceedings were had and entered of record, following to wit:

No. 988.

BENJAMIN H. DYE ET AL., Appellants,
vs.
H. C. CRARY ET AL., Appellees.

Appeal from District Court, Socorro County.

This case coming on before the court upon a motion of appellees for a rehearing herein, and the court having had the said
11 motion under advisement, and being now sufficiently advised in the premises; denies and overrules the same: It is therefore considered and adjudged by the court that the motion for a rehearing herein, be, and the same hereby is overruled.

And afterwards, *on* to wit: on the thirtieth day of December A. D., 1904, there was filed in the office of the clerk of the said supreme court of the Territory of New Mexico, a motion to recall mandate, which said motion to recall mandate was and is in figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1904.

No. 988.

BENJAMIN H. DYE ET AL., Appellant-,
vs.
H. C. CRARY ET AL., Appellee-.

Appeal from District Court, Socorro County.

Motion to Recall Mandate and Reconsider Motion for Rehearing.

Come now the appellees in this cause (the defendants below) by H. B. Fergusson, their attorney, and move the court to reconsider its action heretofore taken at the present Term of this Honorable Court, in overruling the motion for a re-hearing in this case, filed by these appellees; and for such purpose to recall the mandate heretofore issued, addressed to the District Court of the Third Judicial District of the Territory of New Mexico within and for the County of Socorro (formerly of the fifth Judicial District): and thereafter to take such action in the premises as to this Honorable Court shall seem proper: and for grounds of this motion, it is respectfully shown here to the Court:
12 1st. That this Court in its majority opinion in this cause, reversing the action of the lower Court and remanding the same for a new trial, inadvertently but completely misstated the substance and effect of the decision of the Supreme Court of the United States in the case of Voorhees *vs.* The Bank, 10 Peters 469, in this: That whereas the Supreme Court of the United States in

said case of Voorhees *vs.* The Bank, stated the points to be decided by itself as follows:

"1. By the first section it provides that an affidavit shall be made and filed with the clerk before the writ issues, and, if this is not done, the writ shall be quashed, on motion; no such affidavit is found in the record.

"2. The 15th section directs three month's notice to be given by publication in a newspaper, of the issuing of the attachment, before the judgment shall be entered; the 11th section also prescribes that fifteen days notice of sale shall be given by the auditors; neither of which appears by the record to have been done.

3. By the proviso of the 8th section, the defendant must be three times called, at each of the three terms preceding judgment, and make default, which defaults shall be recorded by the clerk; no entry is made of such defaults at the December Term, *1807*.

4. By the 11th section the auditors are prohibited from selling till the expiration of twelve months from the return of the writ; whereas the order issued before; and it does not appear when the sale was made.

5. The return of the sale by the auditors shows a sale to one person, and a deed to others; not in any mode connected with the record;"

Yet this Court, in said majority opinion, stated the said points as follows: "1—That the affidavit was not in proper form. 2—That there was not sufficient notice given for sale. 3—That the defendants were not three times called as provided by law. 4—That the sale was made before the expiration of the time of notice
13 and 5—That the return of the auditor showed the deed executed to a person other than the purchaser."

1st. The first point is the vital one. The Supreme Court of the United States in said Voorhees *vs.* The Bank case ruled, in the case of a collateral attack on attachment proceedings, that where the record in the attachment case collaterally attacked was wholly silent as to whether an affidavit for attachment had ever been filed, that the filing of such affidavit would, in a collateral attack, be conclusively presumed; and that the filing of such affidavit was a condition precedent to the acquiring of jurisdiction in the attachment proceedings. While this Court in said majority opinion states that in the Voorhees *vs.* The Bank case, the Supreme Court was considering the effect of an affidavit for attachment not in proper form, under collateral attack; and that it was not fatal as a jurisdictional defect, because it was only an irregularity.

2nd. That the said misconception and misstatement of the substance and effect of said decision of the Supreme Court of the United States, was fully stated and set forth in said motion for a rehearing, and this court overlooked the same.

3rd. That the said action of this Court in its majority opinion and in denying said motion for a rehearing, was and is a gri-vious injury to these appellees; that the construction placed by this Honorable court upon the said case Voorhees *vs.* The Bank, would be controlling on the lower Court in a new trial and would deprive these appellees of the benefit of this controlling decision of the Supreme

Court in their favor; and that the great expense of a new trial in the Court below will be a burden to these appellees.

Wherefore, these appellees respectfully pray that the said mandate may by order of this Honorable Court, be recalled, and that said motion for a rehearing be further considered and such action thereon be taken as may seem to this Honorable Court to be just and lawful.

H. B. FERGUSSON,
Attorney for Appellees.

14 DEC. 29, 1904.

Received copy of the foregoing motion.

W. C. CHILDERS,
Att'y for Plaintiff in Error.

Which said motion is endorsed as follows: "No. 988, Supreme Court of the Territory of New Mexico—R. H. Dye *et al., vs.* H. C. Crary *et al.*,—Motion to recall Mandate etc.—Filed in my office this Dec. 30, 1904, José D. Sena, Clerk."

And afterwards *on* to-wit, on the thirtieth day of the said regular term of the Supreme Court, A. D., 1904, the same being the third day of January, A. D. 1905, the following among other proceedings were had and entered of record, following to wit:

No. 988.

BENJAMIN H. DYE ET AL., Appellant-,
vs.
H. C. CRARY ET AL., Appellee-.

Appeal from District Court, Socorro County.

This cause coming on before the court upon the motion of appellee herein to recall the mandate, herein, heretofore issued, and to further consider the motion for re-hearin*f* filed herein, and the court being sufficiently advised in the premises, grants said motion. It is therefore considered and adjudged by the court that the mandate of thi*e* Court herein, heretofore issued be and the same hereby is ordered recalled, and the clerk of this court is required to issue the necessary process to so recall said mandate; It is further considered by the court that the order heretofor- entered in this court denying the motion for rehearing, be and the same hereby is declared null and void and held for naught, and the further consideration of the said motion for rehearing is hereby continued for the term.

15 And Afterwar-s, *on* to-wit on the third day of January A. D., 1905, there was issued out of the office of the clerk of the said Supreme Court of the Territory of New Mexico, a writ directed to the District Court of the Third Judicial District within and for the County of Socorro, commanding the said district court to return to the said Court of the Supreme Court of the Territory of New Mexico, the mandate in the above entitled cause, heretofore

issued which said writ was duly complied with, by returning to the said Supreme Court the mandate in the above entitled cause as ordered per said writ, And afterwards, on to wit: on the 23rd day of January, A. D. 1905, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a certified copy of record as to mandate, which said certified copy of the record as to mandate was and is in words and figures following to wit:—

Territory of New Mexico to the District Court sitting within and for the County of Socorro in the Third Judicial District, Greeting:

Whereas, in certain cause lately pending before you, wherein Benjamin H. Dye, *et als.* were plaintiffs and H. C. Crary *et als.*, were defendants, by your consideration in that behalf, judgment was entered against said plaintiffs

Whereas, the said cause and judgment was afterwards brought into our Supreme Court for review by appeal, whereupon such proceedings were had in said Supreme Court that at the January 1904 term thereof, on the 29th day of the said term, the same being October 17th, 1904, it was considered that the judgment aforesaid, by you in form given be reversed and that said cause be remanded to you with directions to proceed further in accordance with the opinion of the court herein.

Now, Therefore, You are hereby commanded to reinstate said cause on your docket and proceed further in accordance with the opinion of the court herein.

16 Witness The Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and the seal of said Supreme Court, this 29th day of November, A. D., 1904.

[SEAL.] (Signed) JOSÉ D. SENA, *Clerk.*

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 988.

BENJAMIN H. DYE ET AL., Appellants,
vs.
H. C. CRARY ET AL., Appellees.

Appeal from District Court, Socorro County.

Syllabus.

There is no authority in this Territory for issuing an alias writ of attachment, and property levied upon under such a writ gives the court no jurisdiction over such property.

Statement of Facts.

This is a suit in ejectment to recover the undivided five-sixths of a mining claim known as the "Compromise Mine" situate at White

Oaks, Lincoln County, New Mexico. On March 3rd, 1898, defendant John Taliaferro commenced attachment proceedings in the district court against Benjamin H. Dye, on two certain promissory notes. The affidavit for the writ of attachment alleged that Dye was at the time of the commencement of the suit a non-resident of the Territory. The writ of attachment was issued and delivered to the sheriff and returned by the sheriff on the 16th day of March, 1898, executed, as shown by the return, by levying upon and attaching Dy's right and interest in lots 2, 8 and 11 in section 25 township 6 south of range 11 east. Notice of the pendency of the suit was given by publication in the White Oaks Eagle. The first publication
17 thereof was on March 17, 1898, and the last on April 14th, 1898, it having been published each week in said newspaper. It further appeared that on March 7, 1898, there had been levied an attachment in favor of Zeigle Brothers, for the sum of $37.70 on the same property. On March 11th, 1898, the plaintiff procured from the clerk of said court an alias writ of attachment, the record showing no new affidavit and no new bond given. The Sheriff's return on said alias writ shows that he returned the said alias writ executed on May 27, 1898, upon the property in controversy. On the 19th of August, 1898, the plaintiff filed motion for a judgment, and on the -rist of December, 1898, judgment was rendered by the court against Dye, sustaining the attachment and ordering the attached property sold. A writ of *venditioni exponas* was issued, reciting the attachment and the levy on the mine, but saying nothing about the levy upon the lots. The mine was sold under said writ in February, 1899, to Jones Taliaferro. On December 4, 1900, Dye conveyed and undivided one half of his undivided interest in said mining claim to Wm. B. Childers. This cause came on for trial before a jury. After the evidence was introduced the court directed a verdict in favor of the defendants to which plaintiffs excepted. Plaintiffs filed motion for a new trial, which was overruled and exception preserved. Judgment was rendered upon the verdict; appeal prayed for and allowed.

Opinion of the Court.

BAKER, *J.*:

If the court acquired jurisdiction of the subject matter in this case all the irregularities complained of must be brushed aside. Voorhees *v.* U. S. Bank 35 U. S., 447; Cooper *v.* Raynolds, 77 U. S., 308. If the alias writ of attachment was lawfully issued the court in Taliaferro *v.* Dye had jurisdiction of the *rem* and power to order the sale of the property attached. Was the alias writ of attachment issued by authority of law? The answer to this question
18 must settle the controversy in this case. The legislature has undertaken to give us an attachment procedure. Compiled Laws, 1897, sections 2686 to 2736 inclusive. If alias writs of attachment are not authorized by our statutes then they cannot issue. Section 2686 provides that when a claim is one hundred dollars or over you may sue in the district court by attachment, by setting up the statutory grounds therefor. Section 2690 of the compiled laws pro-

vides that the bond (approved by the clerk), the affidavit and petition shall be filed before the attachment shall be issued. Section 2696 provides that *original* writs of attachment shall be directed to the sheriff. Section 2697 provides that "*original* writs of attachment shall be issued and returned in like manner as ordinary writs of citation." Why the use in section 2690, 2696 and 2697 of the words "original attachments"? Did the legislature mean thereby to exclude alias writs of Attachment? Section 2715, compiled laws provides the form of the bond as well as the conditions thereof, as follows:

"Know all men by these presents, that we (A. B. as principal or C. D. Agent, for A. B., principal, as the case may be) and N. M. and M. M. his sureties, are held and firmly bound unto the Territory of New Mexico in the sum of — dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents, sealed with our seals and dated this — day of ——, A. D., ——.

The Condition of the above obligation is such that whereas the above named A. B. has this day sued out an attachment before J. J. Clerk of the District Court, against E. F., for the sum of — dollars, returnable to the next term of the district court for the county of ——."

The original writ of attachment would be returnable at the next term of the court, while the alias writ of attachment might not be issued until long after such term. Could it be said that the bondsmen would be holden for damages for the wrongful suing out
19 of the alias writ of attachment when the bond provides that the conditions of the above obligation are such that whereas the above named A. B. has this day sued out an attachment against E. F. for — dollars, returnable at the — term of the District court for the county of ——"? We think not. The ground for the attachment might exist when the bond was given and the original writ issued, but might not exist at the time of the issuance of an alias writ. For instance, the first ground of attachment provided for in the statute, non-residence, existing at the time of the issuance of the original writ, might not exist at the time of the issuance of the alias writ, for the defendant long before the issuance of the alias writ might have become a resident of the Territory, and if an alias writ of attachment can be issued at all, it can as well be issued one year after the issuing of the original writ as one day or one month thereafter. The conditions of the parties might change very materially and the bondsmen might not be willing under such changed conditions to stand sponsor for the damage that might result from the issuance of an alias or any other writ of attachment under the then existing circumstances. Yet, if an alias writ may issue, it must carry with it the obligation of the bondsmen: otherwise you have a writ of attachment without bond, which certainly cannot be contended. Sections 2721 and 2722 of the compiled laws provides for ancillary writs of attachment and mode of procedure, but they shed no light on the subject of an alias writ of attachment.

Attachment being derogation of the common law, must comply

with the statute. Cyc. 4 Procedure, p. 400 Par. 4 and citations. 2 A. & E. Ency. of Law, 184, (2nd ed.); Drake on Attachment, 5 Ed. Sec. 4; Wapple on Attachment, p. 24, sec. 7, 1 Wade on Attachment Sec. 2; 1 Shin on Attachment, Sec. 8; 3 Blackstone's Com. Chapter 19.

The common law is the rule of practice and decision in this Territory. Compiled Laws, 1897, sec. 2871.

20 Attachment being in derogation of the common law, we must look to our statutes. If our statute*d* do not authorize the issuance of an alias writ of attachment, then one cannot be issued. Certainly our statute*d* do not provide for an alias writ of attachment in express terms; no*t* do we think, by implication.

The position of the appellees that section 2727, compiled laws gives the court jurisdiction of the property of the defendant from and after the issuance of the writ is tenable only so far as it relates to the property actually levied upon. The court acquires its jurisdiction from a legal writ, a levy thereof and a return thereon by the proper officer. In Cooper *v.* Reynolds *supra,* at page 319, the court says: "Now in this class of cases on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which in this case is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionable is in proceedings purely *in rem.* Without this the court can proceed no further; with it, the court can proceed to subject that property to the demand of the plaintiff. If the writ of attachment is the lawf*il* writ of the court, issued in proper form under the seal of the court, and if it is by proper officer levied upon property liable to the attachment, when such a writ is returned into court the power of the court over the *res* is established." This case is much relied upon by appellees. They also cite with much reliance the case of Voorhees *v.* Bank, *supra,* in which case at page 440 the court says: "On comparing the record of the proceeding on the attachment with the provisions of the act of 1865, (Chase's Ohio Laws, 462 &c.) the acts of the court in all of the course of the cause appeared to be in conformity therewith, except in the following particulars on which the objections to the validity of the sale are founded." The five objections in short, were: 1; that the affidavit was not in proper form; 2: that there was not sufficient notice

21 given for sale; 3: that the defendants were not three times called as provided by law; 4: that the sale was made before the expiration of the time of notice, and 5: that the return of the auditor showed the deed executed to a person other than the purchaser. It will be observed that these objections were merely irregularities, and further, that the record as stated by the court showed that the court had jurisdiction; that is to say*m* there was a legal writ of attachment; that it was levied, and that the proper return by the proper officer was made thereon. A judgment of a court of competent jurisdiction is presumed to be regular and correct and that all things to be done to make it so were done, unless the co*u*ntrary affirmatively appear- on the face of the record of such case. This

proposition is settled by an unbroken line of authorities, and no citations are called for.

The record in the case of Talliaferro *v.* Dye shows that on March 3, 1898, the suit was begun; that a writ of attachment issued and was delivered to the sheriff on the 15th of March, 1898, on which day plaintiff executed the same by levying upon the undivided ½ of lots 2, 8 and 11, in section 25, and on other property (not the property levied upon by the alias writ of attachment—in township 6 south range 11, E. The sheriff made due return of his doings under the writ of the 16th of March, and on the 17th of March, notice of suit by publication was begun and continued weekly in a weekly newspaper until the 14th day of April, 1898.

The record also shows that on the 11th day of May, 1898, an alias writ of attachment was issued and that no additional or other affidavit or bond was filed. It will be thus observed that the record in the case of Talliaferro *vs.* Dye expressly and clearly shows that the original writ of attachment was issued, executed and returned, thus ending the life of that writ of attachment, and that the alias writ of attachment thereafter issued. So, then, if there is no authority to issue an alias writ of attachment, the record, disclosing that one was issued, shows upon its face the want of jurisdiction of the court over
22 the property levied upon under such alias writ. We are of the opinion that the alias writ of attachment in the case of Talliaferro against Dye, was issued without authority of law and conferred no jurisdiction upon the court over the property attached thereunder. Therefore the court acted without jurisdiction and the purchaser at the sale of the property under such alias writ of attachment got no title, and those claiming said property under said Taliaferro in whole or in part, as well as said Taliaferro, acquired no title and have no title to the property in controversy.

This case must be reversed and remanded for further proceedings in accordance with this opinion; and it is so ordered.

(Signed) BENJAMIN S. BAKER,
Associate Justice.

We Concur:
WM. H. POPE.
EDWARD A. MANN.
FRANK W. PARKER.

Dissenting Opinion.

MILLS, *C. J.:*

I regret that I cannot agree with the conclusions reached by the majority of my brothers in deciding this case.

This suit is in ejectment and by it the appellants sought to eject the appellees from the mining claim in question. On the trial of the record in the case of Taliaferro *vs.* Dye, a proceeding in attachment, under the sale in which case appellees claim title, was introduced in evidence, over the objection of appellees' counsel, to show

that the proceedings in that case were not regular and that the judgment given in it was void.

It cannot be successfully denied that this is a collateral attack upon the judgment given in the case of Taliaferro *vs.* Dye, nor can it be denied that that was a proceeding in *rem,* or a quasi pro-
23 ceeding in *rem,* where it was sought to subject property of Dye, in this Territory to the paymebt of a debt, Dye being absent, so that no personal service could be had upon him.

The principal points relied upon by appellants to reverse this case relate to the defects which they allege were committed in the attachment suit of Taliaferro *vs.* Dye. They are:

I. That under the laws of this Territory, there is no authority for the issuing of an alias writ of attachment.

II. That notice of publication of pencency of suit, was not such as to give the court jurisdiction to render a judgment and,

III. That no notice by publication was given when the interest of the defendant, Dye, in the mining claim was attached, under the alias writ of attachment, and which interest was subsequently sold.

I will first consider whether or not alias writs of attachment can be issued in this Territory. The issuing of such alias writ is not directly provided for by any statute which I have been able to discover. The only section which would appear to authorize their issuance is the general power given to courts in section 2727, Compiled Laws of 1897, which reads in part as follows: "From the time of the issuing of the order of attachment, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings in relation thereto." Certainly there is no positive law of the Territory which forbids the issuance of such alias writs. I can see no good reason why they should not be allowed to issue in proper causes, as for instance when the first writ has expired without being served, or when it has been lost by the officer before being returned, or when additional property belonging to the debtor has been discovered after the service of the first writ. Nor do I see any reason why an additional affidavit or bond should be required from the plaintiff, provided that the original ones are not defective and are in proper form. I am aware that the courts of the several states which have passed upon this question hold divergent views
24 as to the right of issuing alias writs of attachment, when the issuing of such writs are not provided for by statute. A collection of the authorities on the subject of the issuance of successive writs of attachment will be found in 4 Cyc. 553, note 27. The reasons supporting the issuance of such writs are discussed in the cases of Hamil *vs.* Phenicie, 9 Iowa, 525, and Elliott *v.* Stevens, 10 Iowa, 418. Not only does the weight of authority seem to predominate in favor of the issuance of such writs, but I can see no good reason why alias writs of attachment should not issue, the same as alias writs in other suits.

In the case at bar, the record shows that at the time the original writ of attachment was levied on the real estate, that other writs of attachment had previously been levied on the same property by other persons who had claims against Dye. It seems to me that

it would be manifestly improper to hold under the state of facts which exists in this case, that Taliaferro would be compelled to dismiss the suit already brought by him, and file a new complaint affidavit and bond, before he could levy his writ on other property of the defendant Dye, which was unincumbered.

In commenting upon what notice is required in the absence of a defendant in Cooper *vs.* Reynolds, 10 Wall. 316, The Supreme Court of the United States says:

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.

"Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause.

"Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judg-
25 ment which the court may undertake to make in the particular cause denends upon the nature and extent of the authority vested on it by law in regard to the subject-matter of the cause.

"It is to be observed that in reference to jurisdiction of the person, the statutes of the States here provided for several kinds of service of original process short of actual service on the party to be brought before the court, and the nature and effect of this service, and the purpose which it answers, depend altogether upon the effect given to it by the statute. So also while general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *rem* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and laying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court."

Holding that the district court of Lincoln County had jurisdiction of the subject matter, and authority to issue the alias writ of attachment, by virtue of which writ the interest of Dye in the mining claim was subsequently sold, I consider the court bound by the law as laid down in Voorhees *vs.* Bank, 10 Peters 449, and Cooper *vs.* Reynolds 10 Wall., 308. In speaking of Voorhees *vs.* Bank, where the defendant, like the appellees here, held real estate by virtue of a sale made under attachment proceedings, the court says:—

"Against a non-resident who had never been served with
26 process or appeared in the case, no effect was produced, nor publication of notice nor appraisement of the property, but it was condemned and sold without waiting twelve months from the return of the writ, and without calling him at three different terms of court, all of which are specially required by the act regulating the proceeding in Ohio, where they were had. This court held that there was sufficient evidence of jurisdiction in the court which rendered the judgment, notwithstanding the defects we have mentioned, and that they were not fatal in collateral proceedings," Cooper *vs.* Reynolds, *supra;* and in the same case in speaking of the publication of notice the court says: "So also of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made, and undoubtedly, if there had been no such publication, a court of errors might reverse the judgment.

"But when the writ has been issued, the property seized, and that property condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice."

The rule as laid down in these cases has been constantly followed by the Supreme Court of the United States and by practically all of the Federal Courts. In a case which came before the United States Circuit Court in Colorado, to foreclose a mortgage, in speaking of a suit brought in the state court of Colorado, in which a bill in chancery was filed, which among other things sought to set aside two judgments which had been obtained in the district court of that state in an attachment suit against certain mining property, on the ground that there was no service of process and no appearance by the defendant, Judge Hallett, says: "From this it seems that the supreme court of the state has reached the conclusion that the judgments obtained by Perkins and Noynhan were improperly entered; that is, that there was error in the record. But from some circumstances attending the case they had declined to vacate the judgments.

It is difficult to perceive what effect that statement can have
27 upon the position of the parties on this case and in this court. If it was stated that the supreme court had reached the conclusion that the judgments were void, and had declared them to be void, and set them aside upon that ground, we should still be compelled in this court to adhere to the doctrine first announced in the case, and which is found in Cooper *vs.* Reynolds. The principal declared in Cooper *vs.* Reynolds is of general jurisprudence, affecting all actions in Federal courts, and not at all controlled by any decision that me be made in any court of any state." Needham *v.* Wilson, 47 Fed., 97.

Appellants in their brief rely upon a number of cases from the state of Missouri to sustain their contention that the judgment taken in the attachment case was void, and could be attacked collaterally. Their claim seems to be sustained by some of the earlier cases decided in that state, but however, in 1874, the supreme court of Missouri says in speaking of the lack of sufficient publication of the pendency of a suit, before the rendition of the judgment, (and I think that this case had not since been overruled), "The effect of a

number of late decisions of this court is, that where in an attachment suit, the required affidavit and bond have been filed, and an attachment regularly issued, and land seized and levied on by virtue of the attachment, the court thereby acquires jurisdiction of the case as to the property attached, and that a judgment rendered in such case against the property attached will not be void, although no sufficient publication is made; that the omission to prove publication is only an irregularity in the proceedings in a case of which the court already has jurisdiction, so far as the attached property is concerned, and that although a judgment rendered in such case might be set aside for irregularity in a direct proceeding for that purpose, yet the judgment would not be held absolutely void in a collateral proceeding." Johnson *vs.* Gage, 57 Mo. 165.

I am aware of and have no desire to criticise in any manner the opinion rendered by this court in the case of Smith *vs.* Mon-
28 toya, 3 N. M. 13. In that case this court held that a notice by publication in almost the identical words used in this, except as to parties and amount of debt, was not good, and that a judgment rendered in that case correctly states the law, but it was a direct attack on the judgment by one who had been brought into the case as a garnishee, and who took it up by appeal. In no sense can it be regarded as a collateral attack on a judgment. I do not attack that case in any particular.

For the foregoing reasons I dissent from the opinion of the majority of this court.

(Signed) WILLIAM J. MILLS,
Chief Justice, etc.

I concur in the dissenting opinion filed by the Chief Justice.

(Signed) JOHN R. McFIE,
Associate Justice.

And afterwards, *on* to wit: at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government on the first Wednesday after the first Monday in January A. D., 1905 the same being the 4th day of January A. D., 1905, on the sixteenth day of the said regular term, the same being, Wednesday, the 25th day of January, A. D., 1905 the following among other proceedings were had and entered of record following to wit:—

No. 988.

BENJAMIN H. DYE ET AL., Appellants,
vs.
H. C. CRARY ET AL., Appellees.

Appeal from District Court, Socorro County.

This cause coming on to be heard upon the motion of appellees herein for a rehearing, and the motion of appellants to over-
29 rule the motion for rehearing, and the same having been submitted to the court and the court having had the same

under advisement, and being sufficiently advised in the premises, grants the motion of appellants to overrule the motion for rehearing herein and overrules the motion of appellee for a rehearing. It is therefore considered and adjudged by the court that the motion of appellants to overrule the motion of appellants for a rehearing is hereby granted, and that in accordance therewith the motion of appellee for a rehearing, herein, be and the same hereby is overruled and denied.

And afterwards, *on* to wit on the seventeenth day of October, A. D., 1904, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court, and also a dissenting opinion, which said opinion by the court and said dissenting opinion are in words and figures following to wit:

30 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 988.

BENJAMIN H. DYE ET AL., Appellants,
vs.
H. C. CRARY ET AL., Appellees.

Appeal from District Court, Socorro County.

Syllabus.

There is no authority in this Territory for issuing an alias writ of attachment, and property levied upon under such a writ gives the court no jurisdiction over such property.

Statement of Facts.

This is a suit in ejectment to recover the undivided five-sixths of a mining claim known as the "Compromise Mine" situate at White Oaks, Lincoln County, New Mexico. On March 3rd, 1898, defendant John Taliaferro commenced attachment proceedings in the district court against Benjamin H. Dye, on two certain promisory notes. The affidavit for the writ of attachment alleged that Dye was at the time of the commencement of the suit a non-resident of the Territory. The writ of attachment was issued and delivered to the sheriff and returned by the sheriff on the 16th day of March, 1898, executed, as shown by the return, by lev-ing upon and attaching Dy-'s right and interest in lots 2, 8 and 11 in section 25 township 6 south of range 11 east. Notice of the pendency of the suit was given by publication in the White Oaks Eagle. The first publication
31 thereof was on March 17, 1898, and the last on April 14th, 1898, it having been published each week in said newspaper. It further appeared that on March 7, 1898, there had been levied an attachment in favor of Zeigle Brothers, for the sum of $37.70 on the

same property. On March 11th, 1898, the plaintiff procured from the clerk of said court an alias writ of attachment, the record showing no new affidavit and no new bond given. The Sheriff's return on said alias writ shows that he returned the said alias writ executed on May 27, 1898, upon the property in controversy. On the 19th of August, 1898, the plaintiff filed motion for a judgment, and on the -rist of December, 1898, judgment was rendered by the court against Dye, sustaining the attachment and ordering the attached property sold. A writ of *venditioni exponas* was issued, reciting the attachment and the levy on the mine, but saying nothing about the levy upon the lots. The mine was sold under said writ in February, 1899, to Jones Taliaferro. On December 4, 1900, Dye conveyed *and* undivided one half of his undivided interest in said mining claim to Wm. B. Childers. This cause came on for trial before a jury. After the evidence was introduced the court directed a verdict in favor of the defendants to which plaintiffs excepted. Plaintiffs filed motion for a new trial, which was overruled and exception preserved. Judgment was rendered upon the verdict; appeal prayed for and allowed.

Opinion of the Court.

BAKER, *J.:*

If the court acquired jurisdiction of the subject matter in this case all the irregularities complained of must be brushed aside. Voorhees *v.* U. S. Bank 35 U. S., 447; Cooper *v.* Raynolds, 77 U. S., 308. If the alias writ of attachment was lawfully issued the court in Taliaferro *v.* Dye had jurisdiction of the *rem* and power to order the sale of the property attached. Was the alias writ of attachment issued by authority of law? The answer to this question must settle
32 the controversy in this case. The legislature has undertaken to give us an attachment procedure. Compiled Laws, 1897, sections 2686 to 2736 inclusive. If alias writs of attachment are not authorized by our statutes then they cannot issue. Section 2686 provides that when a claim is one hundred dollars or over you may sue in the district court by attachment, by setting up the statutory grounds therefor. Section 2690 of the compiled laws provides that the bond (approved by the clerk), the affidavit and petition shall be filed before the attachment shall be issued. Section 2696 provides that *original* writs of attachment shall be directed to the sheriff. Section 2697 ptovides that "*original* writs of attachment shall be issued and returned in like manner as ordinary writs of citation." Why the use in section- 2690, 2696 and 2697 of the words "original attachments"? Did the legislature mean thereby to exclude alias writs of attachment? Section 2715, compiled laws provides the form of the bonds as well as the conditions thereof, as follows:

"Know all men by these presents, that we, (A. B. as principal or C. D. Agent, for A. B., principal, as the case may be) and N. M. and M. M. his sureties are held and firmly bound unto the Territory of New Mexico in the sum of —— dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents, sealed with our seals and dated this — day of —— A. D., —.

The Condition of the above obligation is such that whereas the above named A. B. has this day sued out an attachment before J. J. Clerk of the District Court, against E. F., for the sum of —— dollars, returnable to the next term of the district court for the county of ——."

The original writ of attachment would be returnable at the next term of the court, while the alias writ of attachment might not be issued until long after such term. Could it be said that the bondsmen would be holden for damages for the wrongful suing out
33 of the alias writ of attachment when the bond provides that "the conditions of the above obligation are such that whereas the above named A. B. has this day sued out an attachment against E. F. for —— dollars, returnable at the —— term of the district court for the county of ——"? We think not. The ground for the attachment might exist when the bond was given and the original writ issued, but might not exist at the time of the issuance of an alias writ. For instance, the first ground of attachment provided for in the statute, non-residence, existing at the time of the issuance of the original writ, might not exist at the time of the issuance of the alias writ, for the defendant long before the issuance of the alias writ might have become a resident of the Territory, and if an alias writ of attachment can be issued at all, it can as well be issued one year after the issuing of the original writ as one day or one month thereafter. The conditions of the parties might change very materially and the bondsmen might not be willing under such changed conditions to stand sponser for the damage that might result from the issuance of an alias or any other writ of attachment under the then exising circumstances. Yet, if an alias writ may issue, it must carry with it the obligation of the bondsmen: otherwise you have a writ of attachment without bond which certainly cannot be contended. Sections 2721 and 2722 of the compiled laws provides for ancillary writs of attachment and mode of procedure, but they shed no light on the subject of an alias writ of attachment.

Attachment being derogation of the common law, must comply with the statute. Cyc. 4 Procedure, p. 400 Par. 4 and citations. 2 A. & E. Ency. of law, 184, (2nd ed.); Drake on Attachment, 5 Ed. Sec. 4; Wapple on attachment, p. 24, sec. 7, 1 Wade on Attachment Sec. 2; 1 Shin on attachment, Sec. 8; 3 Blackstone's Com. Chapter 19. The common law is the rule of practice and decision in this Territory. Compiled Laws, 1897, sec. 2871.

34 Attachment being in derogation of the common law, we must look to our statutes. If our statute*d* do not authorize the issuance of an alias writ of attachment, then one cannot be issued. Certainly our statute*d* do not provide for an alias writ of attachment in express terms; no*t* do we think, by implication.

The position of the appellees that section 2727, compiled laws gives the court jurisdiction of the property of the defendant from and after the issuance of the writ is tenable only so far as it relates to the property actually levied upon. The court acquires its jurisdiction from a legal writ, a levy thereof and a return thereon by the proper officer. In Cooper *v.* Reynolds *supra*, at page 319, the court

says: "Now in this class of cases on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which in this case is the same in effect, the levy of the writ of attachment on it, is the one essential requ-site to jurisdiction, as it unquestionable is in proceedings purely *in rem*. Without this the court can proceed no further; with it, the court can proceed to subject that property to the demand of the plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by proper officer levied upon property liable to the attachment, when such a writ is returned into court the power of the court over the res- is established." This case is much relied upon by appellees. They also cite with much reliance the case of Voorhees *v.* Bank, *supra,* in which case at page 440 the court says: "On comparing the record of the proceeding on the attachment with the provisions of the act of 1865, (Chase's Ohio Laws, 462 &c.) the acts of the court in all of the course of the cause appeared to be in conformity therewith, except in the following particulars on which the objections to the validity of the sale are founded." The five objections in short, were: 1; that the affidavit was not in proper form; 2: that there was not sufficient notice given for sale; 3: that the defendants were not three times called as provided by law; 4: that the sale was made before the expiration of the time of notice, and 5: that the return of the auditor showed the deed executed to a person other than the purchaser. It will be observed that these objections were merely irregularities, and further, that the record as stated by the court showed that the court had jurisdiction; that is to say there was a legal writ of attachment; that it was levied, and that the proper return by the proper officer was made thereon. A judgment of a court of competent jurisdiction is presumed to be regular and correct and that all things to be done to make it so were done, unless the countrary affirmatively appear on the face of the record of such case. This proposition is settled by an unbroken line of authorities, and no citations are called for.

The record in the case of Talliaferro *v.* Dye shows that on March 3, 1898, the suit was begun; that a writ of attachment issued and was delivered to the sheriff on the 15th of March, 1898, on which day plaintiff executed the same by levying upon the undivided ½ of lots 2, 8 and 11, in section 25, and on other property (not the property levied upon by the alias writ of attachment—in township 6 south range 11, E. The sheriff made due return of his doings under the writ of the 16th of March, and on the 17th of March, notice of suit by publication was begun and continued weekly in a weekly newspaper until the 14th day of April, 1898.

The record also shows that on the 11th day of May, 1898, an alias writ of attachment was issued and that no additional or other affidavit or bond was filed. It will be thus observed that the record in the case of Talliaferro *vs.* Dye expressly and clearly shows that the original writ of attachment was issued, executed and returned, thus ending the life of that writ of attachment, and that the alias writ of attachment thereafter issued. So, then, if there is no authority to issue an alias writ of attachment, the record, disclosing

that one was issued, shows upon its face the want of juris-
36 diction of the court over the property levied upon under such alias writ. We are of the opinion that the alias writ of attachment in the case of Talliaferro against Dye, was issued without authority of law and conferred no jurisdiction upon the court over the property attached thereunder. Therefore the court acted without jurisdiction and the purchaser at the sale of the property under such alias writ of attachment got no title, and those claiming said property under said Taliaferro in whole or in part, as well as said Taliaferro, acquired no title and have no title to the property in controversy.

This case must be reversed and remanded for further proceedings in accordance with this opinion; and it is so ordered.

(Signed) BENJAMIN S. BAKER,
Associate Justice.

We concur:
WM. H. POPE.
EDWARD A. MANN.
FRANK W. PARKER.

Dissenting Opinion.

MILLS, *C. J.*:

I regret that I cannot agree with the conclusions reached by the majority of my brothers in deciding this case.

This suit is in ejectment and by it the appellants sought to eject the appellees from the mining claim in question. On the trial of the record in the case of Taliaferro *vs.* Dye, a proceeding in attachment, under the sale in which case appellees claim title, was introduced in evidence, over the objection of appellees' counsel, to show that the proceedings in that case were not regular and that the judgment given in it was void.

It cannot be successfully denied that this is a collateral attack upon the judgment given in the case of Taliaferro *vs.* Dye, nor can it be denied that that was a proceeding in *rem*, or a *quasi*
37 proceeding in *rem* where it was sought to subject property of Dye, in this Territory to the payment of a debt, Dye being absent, so that no personal service could be had upon him.

The principal points relied upon by appellants to reverse this case relate to the defects which they allege were committed in the attachment suit of Taliaferro *vs.* Dye. They are:—

I. That under the laws of this Territory, there is no authority for the issuing of an alias writ of attachment.

II. That notice of publication of *pencendy* of suit, was not such as to give the court jurisdiction to render a judgment, and,

III. That no notice by publication was given when the interest of the defendant, Dye, in the mining claim was attached, under the alias writ of attachment, and which interest was subsequently sold.

I will first consider whether or not alias writs of attachment can be issued in this Territory. The issuing of such alias writ is not directly provided for by any statute which I have been able to discover. The only section which would appear to authorize their

issuance is the general power given to courts in section 2727, Compiled Laws of 1897, which reads in part as follows: "From the time of the issuing of the order of attachment, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings in relation thereto." Certainly there is no positive law of the Territory which forbids the issuance of such alias writs. I can see no good reason why they should not be allowed to issue in proper causes, as for instance when the first writ has expired without being served, or when it has been lost by the officer before being returned, or when additional property belonging to the debtor has been discovered after the service of the first writ. Nor do I see any reason why an additional affidavit or bond should be required from the plaintiff, provided that the original ones are not defective and are in proper form. I am aware that the courts of the several states which have passed upon this question
38 held divergent views as to the right of issuing alias writs of attachment, when the issuing of such writs are not provided for by statute. A collection of the authorities on the subject of the issuance of successive writs of attachment will be found in 4 Cyc. 553, note 27. The reasons supporting the issuance of such writs are discussed in the cases of Hamil *vs.* Phenicie, 9 Iowa, 525, and Elliott *v.* Stevens, 10 Iowa, 418. Not only does the weight of authority seem to predominate in favor of the issuance of such writs, but I can see no good reason why alias writs of attachment should not issue, the same as alias writs in other suits.

In the case at bar, the records show that at the time the original writ of attachment was levied on the real estate, that other writs of attachments had previously been levied on the same property by other persons who had claims against Dye. It seems to me that it would be manifestly improper to hold under the state of facts which exists in this case, that Taliaferro would be compelled to dismiss the suit already brought by him, and file a new complaint affidavit and bond, before he could levy his writ on other property of the defendant Dye, which was unincumbered.

In commenting upon what notice is required in the absence of a defendant in Cooper *vs.* Reynolds, 10 Wall. 316, the Supreme Court of the United States says:—

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.

"Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause.

"Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or
39 judgment which the court may undertake to make in the particular cause *demands* upon the nature and extent of the authority vested on it by law in regard to the subject-matter of the cause.

"It is to be observed that in reference to jurisdiction of the person, the statutes of the States here provided for several kinds of service of original process short of actual service on the party to be prought before the court, and the nature and effect of this service, and the purpose which it answers, depend altogether upon the effect given to it by the statute. So also while general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *rem* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and laying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court."

Holding that the district court of Lincoln County had jurisdiction of the subject matter, and authority to issue the alias writ of attachment, by virtue of which writ the interest of Dye in the mining claim was subsequently sold, I consider the court bound by the law as laid down in Voorhees *vs.* Bank, 10 Peters 449, and Cooper *vs.* Reynolds 10 Wall, 308. In speaking of Voorhees *vs.* Bank, where the defendant, like the appellees here, held real estate by virtue of a sale made under attachment procedings, the court says:—

"Against a non-resident who had never been served with process or appeared in the case, no effect was produced, nor publication of notice nor appraisement of the property, but it was condemned and sold without waiting twelve months from the return of the writ, and without calling him at three different terms of court, all of which are specially required by the act regulating the proceeding in Ohio, where they were had. This court held that there was sufficient evidence of jurisdiction in the court which rendered the judgment, notwithstanding the defects we have mentioned, and that they were not fatal in collateral proceedings," Cooper *vs.* Reynolds, *supra;* and in the same case in speaking of the publication of notice the court says: "So also of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made, and undoubtedly, if there had been no such publication, a court of errors might reverse the judgment.

"But then the writ has been issued, the property seized, and that property condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice."

The rule as laid down in these cases has been constantly followed by the Supreme Court of the United States and by practically all of the Federal Courts. In a case which came before the United

States Circuit Court in Colorado, to foreclose a mortgage, in speaking of a suit brought in the state court of Colorado, in which a bill in chancery was filed, which among other things sought to set aside two judgments which had been obtained in the district court of that state in an attachment suit against certain mining property, on the ground that there was no service of process and no appearance by the defendant, Judge Hallett, says: "From this it seems that the supreme court of the state has reached the conclusion that the judgments obtained by Perkins and Noynhan were improperly entered; that is, that there was error in the record. But from some circumstances attending the case they had declined to vacate the judgments. It is difficult to perceive what effect that
41 statement can have upon the position of the parties on this case and in this court. If it was stated that the supreme court had reached the conclusion that the judgments were void, and had declared them to be void, and set them aside upon that ground, we should still be compelled in this court to adhere to the doctrine first announced in the case, and which is found in Cooper *vs.* Reynolds. The principal declared in Cooper *vs.* Reynolds is of general jurisprudence, affecting all actions in Federal courts, and not at all controlled by any decision that me- be made in any court of any state." Needham *v.* Wilson, 47 Fed., 97.

Appellants in their brief rely upon a number of cases from the state of Missouri to sustain their contention that the judgment taken in the attachment case was void, and could be attacked collaterally. Their claim seems to be sustained by some of the earlier cases decided in that state, but however, in 1874, the supreme court of Missouri says in speaking of the lack of sufficient publication of the pendency of a suit, before the rendition of the judgment, (and I think that this case had not since been overruled), "The effect of a number of late decisions of this court is, that where in an attachment suit, the required affidavit and bond have been filed, and an attachment regularly issued, and land seized and levied on by virtue of the attachment, the court thereby acquires jurisdiction of the case as to the property attached, and that a judgment rendered in such case against the property attached will not be void, although no sufficient publication is made; that the omission to prove publication is only an irregularity in the proceedings in a case of which the court already has jurisdiction, so far as the attached property is concerned, and that although a judgment rendered in such case might be set aside for irregularity in a direct proceeding for that purpose, yet the judgment would not be held absolutely void in a collateral proceeding." Johnson *vs.* Gage, 57 Mo. 165.

I am aware of and have no desire to criticise in any manner the opinion rendered by this court in the case of Smith *vs.*
42 Montoya, 3 N. M. 13. In that case this court held that a notice by publication in almost the identical words used in this, except as to parties and amount of debt, was not good, and that a judgment rendered in that case correctly states the law, but it was a direct attack on the judgment by one who had been brought into the case as a garnishee, and who took it up by appeal. In no sense

can it be regarded as a collateral attack on a judgment. I do not attack that case in any particular.

For the foregoing reasons I dissent from the opinion of the majority of this court.

(Signed) WILLIAM J. MILLS,
Chief Justice, etc.

I concur in the dissenting opinion filed by the Chief Justice.

(Signed) JOHN R. McFIE,
Associate Justice.

43 Be it remembered, That heretofore, *on* to wit on the eleventh day of October, A. D., 1905, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a transcript of record, in a certain cause therein, docketed as Number 1113 and entitled, Benjamin H. Dye, *et al.*, appellees, *vs.* H. C. Crary *et al.*, appellants, which said transcript of record was and is in words and figures following to wit:

44 In the Supreme Court of the Territory of New Mexico.

Transcript of Record.

Be it remembered, That heretofore, to wit: On the 28th day of December, A. D., 1900, there was filed in the office of the Clerk of the District Court of the Fifth Judicial District of the Territory of New Mexico, in and for the County of Lincoln, in said District, a complaint, which said complaint is in the words and figures following, to-wit:

45 In the District Court of the Fifth Judicial District of the Territory of New Mexico in and for the County of Lincoln.

No. 1267.

BENJAMIN H. DYE and WILLIAM B. CHILDERS, Plaintiffs,
vs.
HENRY C. CRARY and EUGENE HEINIMAN, Defendants.

Complaint.

Benjamin H. Dye, a resident of the County of Lincoln, in the Territory of New Mexico, and William B. Childers, a resident of the County of Bernalillo in said Territory, complain of Henry C. Crary and Eugene Heiniman, Jones Taliaferro, Paul Meyer and Charles Spence, residents of the County of Lincoln in said Territory, and for a cause of action allege:

That heretofore, to-wit, on the first day of October, A. D. 1900, the plaintiffs were and are now entitled to the possession of a certain mine, lead, lode and ledge, and the surface ground through which the same runs, which said surface ground is situated on the east-

erly slope of Baxter Mountain, and on the westerly side of Baxter Gulch on said mountain, in the White Oaks mining district, in said County of Lincoln and Territory of New Mexico, and more particularly described as follows: Commencing at the discovery and location monument whence the southwest corner of "Little Nell" claim as officially established bears north 56 degrees 30 minutes east, one hundred and twenty-nine feet distant, thence north one degree
46 40 minutes west, 155 7/10 feet to the north and center monument, thence north 82 degrees east 200 feet to the northeast corner monument, thence south 1 degree 40 minutes east, 1,170 2/10 feet to the southeast corner monument, thence north 82 degrees east, 300 feet to the north end center, the point of beginning; said claim being one thousand and seventy and two-tenths feet in length and in width two hundred feet on the east side of the vein and three hundred feet on the west side thereof, the total width being five hundred feet, and the name of the said claim being "The Compromise Mining Claim or Lode."

And the plaintiffs being so entitled to the possession of the said mining claim as aforesaid, the said defendant afterwards, to-wit, on the first day of October, A. D. 1900, unlawfully entered into and upon the said mining claim and premises and from them hitherto hath unlawfully withheld and still unlawfully withhold the possession of the same from the plaintiffs, to their damage in the sum of ten thousand dollars.

Wherefore plaintiffs pray judgment for the possession of the said mining claim, and premises, and for their damages in the sum aforesaid, and costs of suit.

WILLIAM B. CHILDERS,
Attorney for Plaintiff.

Endorsed No. 1267. In the District Court, County of Lincoln, No. 3319. Benjamin H. Dye *et al* Plaintiffs, *vs.* Henry C. Crary *et als.*, Defendants. Complaint. *Filed in my office December* 28, 1900. Jno. E. Griffith, Clerk; W. B. Childers, Attorney for Plaintiff.

And thereupon, upon the same day, there was duly issued out of the office of the Clerk of said Court a summons in said cause,
47 which said summons is in words and figures as follows:

Summons.

Territory of New Mexico to Henry C. Crary and Eugene Heiniman, Defendants, Greeting:

You are hereby commanded to appear before the District Court for the County of Lincoln, that being the county in which the complaint herein is filed, in the Fifth Judicial District of the Territory of New Mexico, and answer the complaint of Benjamin H. Dye and William B. Childers, within twenty days after the service hereof, if you are served in any county in the said Fifth Judicial District, otherwise within thirty days after service hereof upon you.

And you are hereby notified that unless you so appear and answer the said plaintiff will ask for the relief demanded in the complaint.

Witness the Honorable Charles A. Leland, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fifth Judicial District Court thereof, and the seal of said District Court this 28th day of December, 1900.

[SEAL.] JNO. E. GRIFFITH,
Clerk of said District Court.

Endorsed: No. 3319. No. 1267. District Court, County of Lincoln, Benjamin H. Dye *et al., vs.* Henry C. Crary *et al.* Original Summons. Filed in my office February 5, 1901. Jno. E. Griffith, Clerk. W. B. Childers, Albuquerque, N. M., Attorney for Plaintiffs.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, Alfredo Gonzales, sheriff of the County of Lincoln, in the Territory of New Mexico, do hereby certify that the within summons came to my hands on the 14th day of January, 1901, that I
48 served the same upon the defendants, Henry C. Crary and Eugene Heiniman, on the 17th day of January, A. D. 1901, by then and there delivering to the said defendants in person a copy of said summons, together with true copies of the complaint in said cause attached to said copies of said summons, at my said County of Lincoln, in the Territory of New Mexico.

Witness my hand as sheriff of the County of Lincoln, this the 17th day of January, A. D. 1901.

ALFREDO GONZALES,
Sheriff of Lincoln County, New Mexico,
By CHAS. D. MAYER,
Deputy Sheriff.

Fees.

Mileage	$10.00
Service	3.00
Return	
Total	$13.00

Received payment from plaintiffs.

C. D. MAYER, *Deputy.*

Filed in my office February 5, 1901,
JOHN E. GRIFFITH, *Clerk.*

And on the first day of February, A. D. 1901, there was filed in the office of the clerk of said court an appearance for defendants in said cause, which appearance is in the words and figures following:

In the District Court in and for the County of Lincoln and Territory of New Mexico.

No. 1267.

BENJAMIN H. DYE and WM. B. CHILDERS, Plaintiffs,
49 *vs.*
HARRY C. CRARY and EUGENE HEINIMAN, Defendants.

Now come the above named defendants, by their attorney, R. E. Lund, whose address is White Oaks, New Mexico, and enter their appearance in this cause.

(Signed) R. E. LUND,
Defendants' Attorney.

Endorsed: District Court Lincoln County, Dye and Childers *vs.* Crary *et al.*, 1267. Defendants' appearance January 30, 1901. Copy mailed to plaintiffs, W. B. Childers, Esq. R. E. Lunds, attorney at law for Defendants, White Oaks, New Mexico. Filed in my office February 1, 1901, John E. Griffith, clerk.

And now on the same day, to-wit: On the first day of February, A. D. 1901, said defendants filed their demurrer to the complaint in said cause, which demurrer is in the following words and figures:

In the District Court in and for the County of Lincoln and Territory of New Mexico.

No. 1267.

BENJAMIN H. DYE and WM. B. CHILDERS, Plaintiffs,
vs.
HARRY C. CRARY and EUGENE HEINIMAN, Defendants.

And the defendants, by their attorney, come and defend, and say that plaintiffs' complaint as to the facts therein stated, and the manner and form in which they are set forth, do not show a full and sufficient cause of action, and that they ought not to be permitted to maintain the same. That, further, plaintiffs' statement- of facts are,

(1.) Indefinite and uncertain, and

(2.) Do not disclose such a claim of right, title or interest in the said property sought and such incidents and facts connected therewith, as serve to reasonable and fairly advise defendants of the nature and extent of their claim and demand.

50 (3.) That plaintiffs assert right of possession, but therein wholly fail to set forth any right or title upon which the same can or does rest, and that they have wholly failed to apprise defendants as to what they will be required to meet, answer and defend.

And the defendants respectfully show to the court that they are

not able to answer, and are not bound to answer said complaint; and this they are ready to verify.

Wherefore defendants pray the judgment of the court, etc., etc.

(Signed) R. E. LUND,
Defendants' Attorney.

To Hon. W. B. Childers, plaintiffs' attorney.

Notice is hereby given that above demurrer will be presented to the court, in chambers, at Socorro, New Mexico, on Thursday, the 7th day of February, A. D. 1901, at the hour of 9 o'clock of the forenoon.

(Signed) R. E. LUND.

Endorsed: District Court, County of Lincoln. B. H. Dye *et al., vs.* H. C. Crary and E. Heiniman, defendants. 1267. Defendants' demurrer, etc. I hereby certify that I served upon plaintiffs' attorney, W. B. Childers, Esq., a full and true copy of within demurrer and notice, this 30th day of January, 1901, by enclosing same in a sealed wrapper addressed to him at his office, Albuquerque, N. M., postage paid. (Signed) R. E. Lund. Filed in my office February 1, 1901. John E. Griffith, clerk. R. E. Lund, attorney at law, for defendants, White Oaks, New Mexico.

And on the same day, to-wit: On the first day of February, A. D. 1901, a motion for security for costs was filed by the defendants in the office of the clerk of said court in said cause, which motion
51 is in the words and figures following, to-wit:

In the District Court in and for the County of Lincoln, New Mexico.

No. 1267.

BENJAMIN H. DYE and WM. B. CHILDERS, Plaintiffs,
vs.
HARRY C. CRARY and EUGENE HEINIMAN, Defendants.

Come now the said defendants, by their attorney, and move the court:

That the plaintiffs be ruled and required to furnish and file with the clerk of this court good and sufficient security for the costs of this action.

(Signed) R. E. LUND,
Defendants' Attorney.

Endorsed: District Court of Lincoln County. Dye & Childers *vs.* Cray *et al.* 1267. Motion for cost bond. I certify that I have this 30th day of January, 1901, served plaintiffs' attorney, W. B. Childers, Esq., with a true copy of this motion by enclosing same in a sealed wrapper, postage paid, to his address at Albuquerque, N. M.

(Signed) R. E. Lund, Attorney for Defendants. Filed in my office February 1, 1901, John E. Griffith, clerk. R. E. Lund, attorney at law, for defendants, White Oaks, New Mexico.

And afterwards, to-wit: On the 5th day of February, A. D. 1901, defendants filed a motion and petition to make John W. German a party defendant in said cause, which said petition and motion is in the words and figures following, to-wit:

In the District Court in and for the County of Lincoln and Territory of New Mexico.

No. 1267.

BENJAMIN H. DYE and WM. B. CHILDERS, Plaintiffs,
52 *vs.*
HARRY C. CRABY and EUGENE HEINIMAN, Defendants.

To the Hon. Daniel H. McMillan, associate justice of Supreme Court and judge of said District Court:

Now come the said defendants, by their attorney of record, and move the court, that one John W. German, a resident of Kansas City and State of Missouri, be made a party defendant in this action; and that he be allowed to appear as such defendant, and defend his action in all respects as fully as if he had been made in plaintiffs' complaint and in the first process of this court herein; and for grounds of this motion defendants show to the court:

(1) That on the 25th day of September last past the said defendants entered into contract with the said John W. German for the sale and delivery to him of the Compromise Lode Claim, the property at issue in this action; copy of which contract is herewith shown to the court.

(2) That the said John W. German did well and truly make payment of the first installment of the purchase price agreed upon for the purchase of the said property, to-wit: the sum of fifteen hundred dollars, and that in consideration thereof the said defendants made, executed and placed in escrow a deed in due form of law, conveying to said German the said Compromise Mine; which deed only awaits the further payments stipulated for in said contract of sale, to become the rightful property of, and to be delivered to, the said grantee, said John W. German.

(3) That on or about the said 25th day of September the possession of the said mine or lode-claim was duly delivered to said John W. German, and that thereafter the said defendants were not in possession of the said property and are not now in possession thereof.

53 And that upon the development of said property the said German has expended many and large sums of money, and is largely interested therein, by reason of the said payment and the said expenditures thereon.

(4) That the said John W. German is therefore a necessary party

to this action and to the right, title and interest of the property in issue herein and defendants pray that the said John W. German may be made a party defendant herein.

(Signed) R. E. LUND,
Attorney for Defendants.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, Harry C. Crary, one of the defendants above named, being first duly sworn, do upon oath say:

(1) That I am one of the defendants in this action.

(2) That as such defendant I have read the above motion and the following grounds set forth in support thereof; and the statements therein made are true and correct within the knowledge of deponent; except as to such matters as are stated upon information and belief, and as to them he believes them to be true.

(Signed) HAR-Y CRARY.

Subscribed and sworn to before me at said county and territory this second day of February, A. D. 1901.

(Signed) ROB'T E. LUND,
[NOTARIAL SEAL.] *Notary Public.*

And now comes the said John W. German, by his attorney, R. E. Lund, and asks leave to unite in the above petition of the said defendants, Crary & Heiniman, because the representations therein made are true, and because he desires to be made a party de-
54 fendant in the said action and deems that his rights, title and interests are therein materially involved.

Dated at White Oaks, N. M., this second day of February, 1901.

Very respectfully,

(Signed) JOHN W. GERMAN,
By R. E. LUND,
His Attorney.

To W. B. Childers, Esq., attorney for plaintiffs.

SIR: Notice is hereby given that above motion and petition will be presented to the court in chambers, at Socorro, N. M., on Tuesday, 19th day of February, A. D. 1901, at 9 o'clock a. m., for the hearing and judgment of the court thereon.

(Signed) R. E. LUND,
Attorney for Defendants and Attorney for J. W. German.

Endorsed: District Court, County of Lincoln. Dye and Childers *vs.* Crary and Heiniman. 1267. Petition and motion to make J. W. German party defendant. I certify that I served plaintiffs' attorney, W. B. Childers, Esq., with full and true copies of within motion and notice by mail, postage paid, this second day of February, 1901, R. E. Lund. Filed in my office February 5, 1901. Jno. E. Griffith, clerk. R. E. Lund, attorney at law, White Oaks, New Mexico.

And on the same day, to-wit: On the 5th day of February, A. D. 1901, defendants filed in the office of the clerk of said court a notice of hearing in said cause, which notice is in the words and figures following:

55 In the District Court in and for the County of Lincoln, Territory of New Mexico.

No. 1267.

B. H. DYE ET AL., Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

To W. B. Childers, Esq., plaintiffs' attorney:

Notice is hereby given that whereas defendants' attorney has had notice that the court will be absent from chambers on the day named for the hearing of the defendants' demurrer in this cause, set for hearing on the 7th inst., that the same will be presented to the court in chambers at Socorro, N. M., on the third Tuesday of this month of February, to-wit: on the 19th day of February, 1901, at the hour of 9 o'clock of the forenoon.

R. E. LUND,
Attorney for Defendants, White Oaks, N. M.

February 2, 1901.

Endorsed: District Court of Lincoln County, B. H. Dye *et al. vs.* Crary *et al.* 1267. Notice of hearing. I certify that I served defendants' attorney, W. B. Childers, Esq., with a copy of within notice by mail, postage paid, this 2d day of February, A. D. 1901, R. E. Lund. Filed in my office February 5, 1901, Jno. E. Griffith, clerk. R. E. Lund, attorney at law, White Oaks, New Mexico.

And afterwards, to-wit: On the 18th day of February, A. D. 1901, filed a notice in said cause with the clerk of said court which notice is in the words and figures following:

In the District Court in and for the County of Lincoln and Territory of New Mexico.

No. 1267.

BENJAMIN H. DYE and WM. B. CHILDERS, Plaintiffs,
56 *vs.*
HARRY C. CRARY and EUGENE HEINIMAN, Defendants.

To Hon. Daniel McMillan, Associate Justice Supreme Court New Mexico and judge of said District Court:

Come now the said defendants, by their attorney of record, and ask leave of court to withdraw from the files of this cause their cer-

tain motion, heretofore filed herein, to-wit: their motion of date February 2, 1901, therein praying that one John W. German, of Kansas City, Mo., be made a party defendant in this cause.

And for grounds of this request defendants show to the court:

(1) That since the filing of their said motion the said John W. German absolutely declines being a party defendant therein and refuses to take any part whatever in the said action or defense.

(2) That the said German, since the said motion was filed, has withdrawn from the property in question in this action, and refuses to complete his purchase or any part thereof, and his right and interest therein have become forfeit to said defendants above named.

February 15, 1901.

(Signed). R. E. LUND,
Attorney for Defendants.

To Hon. W. B. Childers, plaintiffs' attorney:

Notice is hereby given you that above motion for leave of the court to withdraw a former motion as set forth will be presented to the court in connection with, and as forming a part of the former motion, at chambers, at Socorro, on Tuesday the 19th day of February, 1901, at the hour of 9 o'clock of the forenoon.

(Signed) R. E. LUND.

57 Endorsed: District Court of Lincoln County. B. H. Dye *et al. vs.* Crary and Heiniman. 1267. Notice withdrawing former motion. I certify that a full and true copy of within motion and notice were by me mailed in a sealed wrapper, post paid, to defendants' attorney W. B. Childers, Esq., Albuquerque, this 15th day of February, 1901. Signed, R. E. Lund, defendants' attorney. Filed in my office February 18, 1901. Jno. E. Griffith, clerk. R. E. Lund, attorney at law, for defendants, White Oaks, New Mexico.

And afterwards, at a regular term of the District Court held in and for said County of Lincoln, and on the first day of said term, the same being the 29th day of April, A. D. 1901, the following proceedings were had in said cause and entered of record:

No. 1267.

BENJAMIN H. DYE ET AL.
vs.
HENRY C. CRARY ET AL.

Now comes H. B. Fergusson, Esq., and enters his appearance as associate counsel for defendants.

And afterwards, to-wit: On the first day of May, A. D. 1901, plaintiffs filed in said court and in said cause a motion for leave to amend their complaint, which motion is in the words and figures following, to-wit:

In the District Court of the Fifth Judicial District of the Territory of New Mexico Within and for the County of Lincoln.

No. 1267.

BENJAMIN H. DYE ET AL., Plaintiffs,
vs.
HENRY C. CRARY ET AL., Defendants.

Now comes the plaintiffs in the above entitled cause and moves the court to allow them to amend the complaint filed therein by making Jones Taliferro, Paul Meyer and Charles Spence
58 additional defendant- in said cause, it ap-earing that he claims an interest in said suit, and the possession of the property involved therein.

(Signed) W. B. CHILDERS,
Attorney for Plaintiffs.

Endorsed: No. 1267. District Court, Lincoln County. Benjamin H. Dye *et al., vs.* Henry C. Crary *et al.* Motion to amend complaint. Filed in open court, May 1, 1901. Jno. E. Griffith clerk, W. B. Childers, attorney for plaintiff.

And on the same day, to-wit: On the first day of May, A. D. 1901, plaintiffs filed in this cause in said court a motion for change of venue, which motion is in the words and figures following:

In the District Court of the Fifth Judicial District of the Territory of New Mexico Within and for the County of Lincoln.

No. 1267.

BENJAMIN H. DYE ET AL., Plaintiffs,
vs.
HENRY C. CRARY ET AL., Defendants.

Now comes the plaintiffs in the above entitled cause and moves the court for a change of venue therein from the County of Lincoln to some county free from the exceptions for the following reasons, to-wit:

First. Because the plaintiffs cannot obtain a fair trial in the said County of Lincoln by reason of the fact that the adverse party has an undue influence over the minds of the inhabitants of said county; and because by reason of local prejudice in said county in regard to the said cause and the persons involved therein, and an impartial jury cannot be obtained in said county to try the same.

(Signed) W. B. CHILDERS,
Attorney for Plaintiffs.

Endorsed: No. 1267. District Court, Lincoln County.
59 Benjamin H. Dye *et al. vs.* Henry C. Crary *et al.* Motion for change of venue. Filed in open court, May 1, 1901. Jno. E. Griffith, clerk. W. B. Childers, attorney for plaintiffs.

And on the same day, to-wit: On the first day of May, A. D. 1901, a joint affidavit was filed in said cause by plaintiffs in support of their motion for change of venue, which affidavit is in the words and figures following:

In the District Court of the Fifth Judicial District of the Territory of New Mexico Within and for the County of Lincoln.

No. 1267.

BENJAMIN H. DYE ET AL., Plaintiffs,
vs.
HENRY C. CRARY ET AL., Defendants.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Benjamin H. Dye being duly sworn deposes and says: That he is one of the plaintiffs in the above entitled cause and that he believes that the plaintiffs herein cannot obtain a fair trial in the county wherein the same is now pending because the adverse party has an undue influence over the minds of the inhabitants of said county; and because by reason of local prejudice in said county in regard to the said cause and the questions involved therein an impartial jury cannot be obtained in said county to try the same.

(Signed) BENJAMIN H. DYE.

Subscribed and sworn to before me this 1st day of May, 1901.

(Signed) JNO. E. GRIFFITH,
[DIST. COURT SEAL.] *Clerk District Court.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Atwood Littell and Charles Bull being severally sworn, on
60 oath, severally depose and say, each for himself, that they have read the foregoing affidavit subscribed and sworn to by Benjamin H. Dye and hereto attached, and know the contents thereof and they believe the facts therein stated are true, that they are not in any way interested in said cause and are residents of Lincoln county.

(Signed) ATWOOD LITTELL.
(Signed) CHAS. BULL.

Subscribed and sworn to before me this 1st day of May, 1901.

Signed) JNO. E. GRIFFITH,
[DIST. COURT SEAL.] *Clerk District Court.*

Endorsed: No. 1267. District Court, Lincoln County. Benjamin H. Dye *et al. vs.* Henry C. Crary *et al.* Affidavit for change of venue. Filed in open court, May 1, 1901. Jno. E. Griffith, clerk. W. B. Childers, attorney for plaintiffs.

And afterwards, to-wit: On the 2d day of May, A. D. 1901, plain-

tiffs filed in the office of the clerk of said court a cost bond in said cause, which cost bond is in the words and figures following:

Know All Men by These Presents, That we, W. B. Childers, for and on behalf of himself and B. H. Dye, as principal, and Geo. K. Neher and C. M. Foraker, as his sureties, are held and firmly bound unto Henry C. Crary and Eugene Heiniman for the payment of all costs that may be incurred in that certain cause, entitled B. H. Dye *et al.*, plaintiffs, *vs.* H. C. Crary *et al.*, defendants, No. 1267 on the docket, in the District Court of the Fifth Judicial District of the Territory of New Mexico in and for the County of Lincoln, for the payment of which, well and truly to be
61 made we bind ourselves, our heirs, executors and administrators firmly by these presents.

Signed, sealed and dated this the 26th day of April, A. D. 1901.

The condition of the above and foregoing obligation is such, that whereas the above bounden principal, W. B. Childers, together with one B. H. Dye, has filed a suit in the District Court of the Fifth Judicial District of the Territory of New Mexico, within and for the County of Lincoln, against Henry C. Crary and Eugene Heiniman, in ejectment, and which said suit is numbered 1267 on the docket of said court, and whereas, the said defendants have filed a motion in said suit that the said plaintiffs be required to give security for costs, as required by statute;

Now, therefore, if the above bounden principal, and the plaintiffs in said suit shall well and truly pay all costs that may be incurred in and about said cause than may be adjudged by the court to be paid by them, then this obligation shall be null and void, otherwise to remain in full force and effect.

(Signed) W. B. CHILDERS. [SEAL.]
(Signed) GEO. K. NEHER. [SEAL.]
(Signed) C. M. FORAKER. [SEAL.]

TERRITORY OF NEW MEXICO, *County of Bernalillo, ss:*

On this the 26th day of April, A. D. 1901, before me personally appeared W. B. Childers and Geo. K. Neher and C. M. Foraker, principal and surties on the above and foregoing bond, to me personally known, and they each severally acknowledged to me that he executed the same for the purpose therein expressed.

And the said Geo. K. Neher and C. M. Foraker, sureties on the above and foregoing bond, by me being each severally sworn,
62 did say that he is worth the amount set opposite to his name below, in property situate in the Territory of New Mexico, over and above his just debts, and the amount by law exempt from execution and forced sale.

(Signed) C. M. FORAKER, $150.
(Signed) GEO. K. NEHER, $150.

In witness whereof I have hereunto set my hand and official seal on this the 26th day of April, A. D. 1901.

(Signed) E. L. MEDLER,
[NOTARIAL SEAL.] *Notary Public.*

Endorsed: No. 1267. District Court County of Lincoln. B. H. Dye *et al. vs.* H. C. Crary *et als.*, defendants. Security for costs. Filed in open court and approved May 2, 1901. Jno. E. Griffith, clerk. W. B. Childers, attorney for plaintiffs.

And on the same day, to-wit: On the 2d day of May, A. D. 1901, defendants filed their answer in said cause, which answer is in the words and figures following:

In the District Court in and for the County of Lincoln, New Mexico.

BENJAMIN H. DYE and W. B. CHILDERS, Plaintiffs,
vs.
HARRY C. CRARY and EUGENE HEINIMAN, JONES TALIFERO, PAUL MAYER, and CHAS. SPENCE, Defendants.

Action in Ejectment.

Defendants' Answer.

Comes now the defendants by their attorneys of record and defend the wrong and injury complained of in plaintiffs' complaint, and say that they are not guilty of the wrong or injury of trespass alleged against them by plaintiffs, etc.

And of this they put themselves upon the count-y.

H. B. FERGUSSON,
R. E. LUND,
Defendants' Attorneys.

63 And the plaintiffs do*th* the like.

(Signed) W. B. CHILDERS,
Attorney for Plaintiffs.

Endorsed: District Court, Lincoln County. Dye *et al. vs.* Crary *et al.* 1267. Defendants' answer. Filed in open court May 2, 1901. Jno. E. Griffith, clerk. Fergusson and Lund for defendants.

And on the same day, to-wit: On the second day of May, A. D. 1901, at the regular April term of said District Court, sitting within and for the County of Lincoln, and on the fourth day of said term, the following proceedings were had and entered of record.

No. 1267.

B. H. DYE ET AL.
vs.
HENRY C. CRARY ET AL.

Now comes the plaintiffs in the above entitled cause by W. B. Childers, their attorney, and moves the court for leave to make Jones

Taliaferro, Paul Mayer and Charles Spence additional parties defendants in said cause, and the court having heard counsel for the respective parties, sustains said motion, whereupon the plaintiffs insert the names of said additional parties defendant by interlineation in the complaint, and thereupon said defendants, Jones Taliaferro, Paul Mayer and Charles Spence, enter their appearance in said cause, by H. B. Fergusson and R. E. Lund, their attorneys and plead not guilty to the complaint, by uniting the defendants in the plea of not guilty already filed by them.

And this cause now coming on to be heard on plaintiffs' motion for a change of venue of said cause and the court having heard the motion and affidavits in support thereof and counsel for the respective parties doth sustain said motion, and it is hereby ordered that the venue in said cause be changed from the County of
64 Lincoln to the County of Socorro, and said cause is set down for trial on the second Monday of the next May term of said court for the County of Socorro.

And afterwards, to-wit: On the 20th day of May, A. D. 1901, said cause was duly docketed in the said District Court in and for the County of Socorro, being docketed as civil cause No. 3319, and on the same day a transcript of said cause and all the papers heretofore mentioned were duly filed in the office of the district clerk of said Socorro County.

And afterwards, to-wit: On the 30th day of May, A. D. 1901, the defendants filed a plea in said cause in the office of the clerk of said court, which plea is in the words and figures following:

In the District Court of the Fifth Judicial District of the Territory of New Mexico Within and for the County of Socorro.

BENJAMIN H. DYE and WILLIAM B. CHILDERS
vs.
HARRY C. CRARY, EUGENE HEINIMAN, PAUL MAYER, JONES TALIAFERRO and CHARLES SPENCE.

Ejectment on Change of Venue from Lincoln County.

May Term, 1901.

Now comes the said Harry C. Crary, Eugene Heiniman, Paul Mayer, Jones Taliaferro and Charles Spence by R. E. Lund and H. B. Fergusson, their attorneys, and defend the force and injury, when, etc., and say that they are not guilty of the supposed trespass and ejectment above laid to their change, or any part thereof, in manner and form as the said Benjamin H. Dye and William B. Childers have above thereof complained against them; and of this the said defendants put themselves upon the county, etc.

(Signed) R. E. LUND AND
(Signed) H. B. FERGUSSON,
Attorneys for Defendant.

65 Endorsed: No. 3319. District Court, Socorro County. B. H. Dye *et al. vs.* H. C. Crary *et al.* Plea. Filed in my office May 30, 1901. Jno. E. Griffith, clerk. R. E. Lund and H. B. Fergusson, attorneys for defendants.

And afterwards, to-wit: At the regular May, 1901 term of the District Court in said County of Socorro, and on the 22d day of said term, the same being the 14th day of June, 1901, the following proceedings were had and entered of record:

No. 3319.

BENJAMIN H. DYE ET AL.
vs.
H. C. CRARY ET AL.

It is now ordered that this cause be set for trial on the first Thursday of the next term.

And afterwards, to-wit: On the 25th day of October, A. D. 1901, there was filed by defendants with the clerk of said court a notice of trial, which notice is in the words and figures following:

TERRITORY OF NEW MEXICO, *County of Socorro:*

In the Fifth Judicial District Court.

No. 3319.

W. B. CHILDERS ET AL.
vs.
HENRY C. CRARY ET AL.

Ejectment.

On Change of Venue from Lincoln County.

Notice.

To W. B. Childers, Esq., attorney and defendant, and Benjamin H. Dye, defendant:

You and each of you are hereby notified that defendants will demand jury trial of the above entitled cause, and that they will request the clerk of the Socorro County District Court to place said cause on the jury list of cases to be tried at the November term of
66 said court; said term of court to commence on the 25th day of November, 1901.

(Signed) H. B. FERGUSSON,
Attorney for Defendants.

Service of this notice acknowledged this 24th day of October, 1901.
(Signed) W. B. C-ILDERS,
Attorney for Plaintiffs.

Endorsed: No. 3319. Notice of trial by defendants. Filed in my office October 25, 1901. Jno. E. Griffith, clerk.

And afterwards, to-wit: At the regular May, 1902, term of said District Court in and for the County of Socorro, and on the second day of said term, the same being the 20th day of May, 1902, the following proceedings were had in said cause and entered of record.

No. 3319.

BENJAMIN H. DYE ET AL.
vs.
H. C. CRARY ET AL.

Now this cause is set for trial on the fourth Monday of the present term.

And afterwards, to-wit: At the regular May, A. D. 1902, term of the District Court held in and for the said County of Socorro, and on the 21st day of said term, the same being the 10th day of June A. D. 1902, the following further proceedings were had in said cause and entered of record, to-wit:

No. 3319.

BENJAMIN H. DYE ET AL.
vs.
H. C. CRARY ET AL.

Now come the parties herein in person and by counsel, and Elfego Baca, Esq., enters his appearance as associate counsel for defendants, and both plaintiffs and defendants announcing that they are ready to proceed to trial herein, come the following jury:

67
1. Al Strozzle,
2. Sostine Garcia,
3. Juan A. Trujillo,
4. Ramon Gonzales,
5. Nicholas Silva,
6. Frank Landavzo,
7. Jacobo Molina,
8. Salomon Pino,
9. Victorio Escajeda,
10. Adolfo Padilla,
11. Donaciano Gabalden,
12. Juan B. Romero.

Twelve good and lawful men taken from the body of this county, duly selected, drawn, examined, accepted, empaneled and sworn to well and truly try the issue joined in this cause and a true verdict render according to the law and the evidence, and the evidence being partially submitted, the jury retire, in the charge of two sworn bailiffs, to await the incoming of the court on tomorrow morning.

And afterwards, to-wit: on the 22nd day of said term, the same being the 11th day of June, A. D. 1902, the following further proceedings were had in said cause and entered of record:

No. 3319.

BENJAMIN H. DYE ET AL.
vs.
H. C. CRARY ET AL.

Now again come the parties hereto in person and by counsel and come the jury, and further evidence being submitted, the jury again retire in the charge of two sworn bailiffs, to await the incoming of court on tomorrow morning.

And afterwards, to-wit: on the 23rd day of said term, the same being the 12th day of June, A. D. 1902, the following further proceedings were had in said cause and entered of record:

No. 3319.

BENJAMIN H. DYE ET AL.
vs.
H. C. CRARY ET AL.

Now again come the parties hereto in person and by counsel and come the jury, and further evidence being received, the jury
68 retire to await the incoming of court on tomorrow morning in the charge of two sworn bailiffs.

And afterwards, to-wit: on the 24th day of said term, the same being the 13th day of June, A. D. 1902, the following further proceedings were had in said cause and entered of record.

No. 3319.

BENJAMIN H. DYE ET AL.
vs.
H. C. CRARY ET AL.

Now again come the parties and their counsel and come the jury, and A. A. Sedillo being duly appointed and sworn as assistant court interpreter, the taking of the evidence herein is concluded and the jury retire in the charge of two sworn bailiffs to await the incoming of court on tomorrow morning.

And afterwards, to-wit: on the 25th day of said term, the same being on the 14th day of June, A. D. 1902, the following further proceedings were had in said cause and entered of record:

No. 3319.

BENJAMIN H. DYE ET AL.
vs.
H. C. CRARY ET AL.

Now again come the parties in person and by counsel and come the jury; and return into court the following verdict:

In the Fifth Judicial District, Territory of New Mexico, Socorro County.

No. 3319.

BENJAMIN H. DYE ET AL.
vs.
H. C. CRARY ET AL.

We the jury under the direction of the court find the defendants not guilty.

(Signed) SALOMON PINO, *Foreman.*

Whereupon the plaintiffs give notice that they will file a motion for a new trial herein.

69 And afterwards, to-wit: on the 16th day of June, A. D. 1902, the plaintiffs filed a motion for a new trial of said cause in the office of the clerk of said court, which said motion is in the words and figures following, to-wit:

In the District Court of the Fifth Judicial District of the Territory of New Mexico for the County of Socorro, May Term, A. D. 1902.

BENJAMIN H. DYE and WILLIAM B. CHILDERS, Plaintiffs,
vs.
EUGENE HEINIMAN, H. C. CRARY, JONES TALIAFERRO, CHARLES SPENCE ET AL., Defendants.

Now come the plaintiffs in the above entitled cause by W. B. Childers, their attorney, and move the court to set aside the verdict rendered under the instructions of the court on behalf of the defendants, and grant a new trial in this cause and for ground of said motion the plaintiffs show to the court the following, to-wit:

I.

The court admitted on the trial improper evidence on the part of the defendants, that is to say,

(*a.*) The evidence of W. A. Meivers, W. M. Despain, F. B. Alexander, W. R. Fuston, Henry Thomas, John H. Robertson, John Haley, Eugene Heiniman and Henry C. Crary as to statements

made by the plaintiff B. H. Dye as to his interest in the mine involved in this suit and to the effect that he had lost his interest by the sale of the same under attachment, and that he claimed no interest therein, and that he lost the same by letting it lapse, and any other statement or acts testified to by said witnesses for the purpose as claimed by defendants to raise an estoppel against the plaintiffs in this cause—to all of which evidence objections were made at the time the same was offered, and exceptions duly taken to the action of the court in admitting the same.

70 (*b.*) To all of the evidence of the witness J. E. Wharton as to what was submitted to the court at the time the judgment was entered in the attachment suit of Taliaferro *vs.* Dye, and to all of the evidence of said witness as to what was done in said attachment suit and the reasons for suing out an alias writ of attachment, and any other matter testified to by said witness tending in any way to add to, contradict or vary the record and judgment roll in said attachment suit.

(*c.*) To the record in the case of Zeigler Brothers *vs.* Benjamin H. Dye, No. 1142, on the docket of the District Court for the County of Socorro—to all of which evidence objection was made at the time same — offered and exception duly taken to the action of the court in admitting the same.

(*d.*) To the evidence of the witness J. W. Owen as to what he did in the way of levying the writ of attachment in the case of Taliaferro *vs.* Dye, and as to selling the property and executing a deed to the same under said attachment—to the admission of which evidence by the court over plaintiff's objections exception was duly taken at the time.

(*e.*) To the evidence of the witness Jones Taliaferro as to the value of the mine in controversy at the time it was sold under attachment, and at the time this suit was brought, to the admission of which evidence over the objections of the plaintiffs, the plaintiffs then and there duly excepted.

(*f.*) And to other immaterial, irrelevant and incompetent evidence admitted by the court on the trial of said cause over the objections of the plaintiffs which exception was then and there duly taken.

II.

71 The court refused to admit proper evidence offered by the plaintiffs, which will fully appear from the transcript of the stenographer's notes taken on the trial of the said cause, to the exclusion of which the plaintiffs then and there duly excepted.

III.

The court improperly failed and refused to strike out the evidence of witnesses which plaintiffs asked the court to strike out upon the conclusion of defendants' evidence as will fully appear from said motion itself embodied in the notes of the stenographer taken upon the trial of said cause.

IV.

The court improperly refused to instruct the jury to find a verdict in favor of the plaintiffs, to which refusal plaintiffs then and there excepted.

V.

The court improperly instructed the jury to find a verdict in favor of the defendants, to the giving of which instructions the plaintiffs then and there duly excepted.

VI.

Because the verdict in said cause is not sustained by the evidence and is contrary thereto.

VII.

Because the verdict in said cause is contrary to the law of the case.

(Signed) W. B. CHILDERS,
Attorney for Plaintiffs.

(Endorsed:) No. 3319. Territory of New Mexico, County of Socorro. In the District Court. B. H. Dye and W. B. Childers, Plaintiffs, *vs.* Eugene Heiniman, *et als.*, Defendants. Motion for New Trial. Filed in my office June 16, 1902. John E. Griffith, Clerk. W. B. Childers, Att'y for Plaintiffs.

72 And afterwards, to-wit: on the 28th day of said May, 1902, term of the District Court in and for Socorro County, the same being the first day of August, A. D. 1902, the following further proceedings were had in said cause and entered of record:

No. 3319.

BENJAMIN H. DYE and WILLIAM B. CHILDERS
vs.
HENRY C. CRARY and EUGENE HEINIMAN.

This cause coming on to be heard upon the plaintiffs' motion for a new trial, which was heretofore filed in this cause, and the court being duly advised.

It is hereby ordered and adjudged that the said motion of the plaintiffs be, and the same is hereby overruled.

To the overruling of said motion the plaintiffs there and then excepted.

And afterwards, to-wit, on the 22nd day of November, A. D. 1902, the following order was filed and entered of record in said cause, to-wit:

In the District Court of the Fifth Judicial District of the Territory of New Mexico, Within and for the County of Socorro.

No. 3319.

Ejectment. Change of Venue to Socorro County.

BENJAMIN H. DYE and W. B. CHILDERS
vs.
H. C. CRARY, EUGENE HEINIMAN, JONES TALIAFERRO, PADUL MAYER, CHARLES SPENCE, VAN SCHOYCK, and H. B. FERGUSSON.

The jury by whom issue joined in this cause was tried, having found by their verdict, under the direction of the court, that the said defendants are not guilty of unlawfully withholding from the said plaintiffs, Benjamin H. Dye and William B. Childers, the premises in the said plaintiffs' declaration in this cause mentioned and described in manner and form as the said plaintiffs have in
73 their said declaration alleged and the said plaintiffs having filed in this court a motion praying the court to set aside the said verdict of the jury and to grant them a new trial in this cause, which said last named motion was by the court overruled with exception to plaintiffs:

Therefore, it is ordered and adjudged by the court now here that the said plaintiffs take nothing by their suit; and it is further ordered and adjudged by the said court that the said defendants do recover against the said plaintiffs their costs and charges by them about their defense in this behalf expended to be taxed by the clerk, and that the said defendants have execution therefor. It is further ordered and adjudged by the court that the judgment herein run against the sureties on the cost bond by the plaintiffs heretofore filed in this cause, and that the defendants have execution for the said costs and charges against the sureties named in said cost bond.

(Signed) DAN'L H. McMILLAN,
District Judge.

And afterwards, to-wit, on the 29th day of November, A. D. 1902, the attorneys for plaintiffs filed a motion in the office of the clerk of said court asking for an appeal of said cause, which motion is in the words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO, *County of Socorro:*

In the District Court.

No. 3319.

B. F. DYE ET ALS., Plaintiffs,
vs.
H. C. CRARY ET ALS., Defendants.

Motion for Allowance of Appeal.

Now come the plaintiffs in the above entitled cause, and
74 moves the court to grant them an appeal to the Supreme Court of the Territory of New Mexico, from the judgment and decree of the court rendered in this cause; and upon the filing of an appeal bond for costs, that execution for the costs incurred herein be superseded.

(Signed) W. B. CHILDERS,
Attorney for Plaintiffs.

(Endorsed:) No. 3319. Territory of New Mexico, County of Socorro. In the District Court. B. F. Dye, *et als.*, Plaintiffs, *vs.* H. C. Crary, *et als.*, Defendants. Motion for an Order allowing an Appeal. Filed in my Office Nov. 29, 1902. John E. Griffith, Clerk.

And afterwards, on the same day, the following order was signed and entered of record in said cause.

Order Granting Appeal.

This cause coming on to be heard upon the motion of plaintiffs for an order allowing an appeal to the Supreme Court of the Territory of New Mexico, from the judgment and decree of the court rendered in this cause; and the court being now sufficiently advised in the premises, it is ordered that the said motion be granted, and the said plaintiffs be and they are hereby allowed an appeal to the Supreme Court of the Territory of New Mexico from the judgment and decree rendered in this cause.

And it is further ordered that plaintiffs file an appeal bond for security for the costs to be incurred on such appeal, and upon the filing of such bond, that execution for costs against them herein be stayed superceded.

(Signed) DAN'L H. McMILLAN,
District Judge.

And afterwards, on the same day, there was filed in the
75 office of the clerk of said court an appeal bond by said plaintiffs, which appeal bond is in the words and figures fol-owing, to-wit:

TERRITORY OF NEW MEXICO, *County of Socorro:*

In the District Court.

No. 3319.

On Change of Venue from Lincoln County.

B. F. DYE ET ALS., Plaintiffs,
vs.
H. C. CRARY ET ALS., Defendants.

Appeal Bond for Costs.

Know all men by these presents, That we, W. B. Childers as principal, for and on behalf of himself and B. H. Dye, and Alex. Brisapcker, and Wallace Hesselden as his sureties, are held and firmly bound unto H. C. Crary, Jones Taliaferro, Eugene Heiniman, Charles Spence, *et al.*, as defendants in the above entitled cause, for the payment of any and all costs which might or shall be incurred in an appeal taken from the judgment and decree of the District Court of the Fifth District within and for the County of Socorro, on change of venue from Lincoln County, rendered in the above entitled cause, and in which the above principals have taken an appeal to the Supreme Court of the Territory of New Mexico, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly and severally by these presents.

Signed, sealed and dated this the 28th day of November, A. D. 1902.

The condition of the above and foregoing obligation is such, that whereas the above bounden principals, W. B. Childers and B. F. Dye have taken an appeal from the judgment and decree of the District Court of the Fifth Judicial District of the Territory of New Mexico within and for the County of Socorro, in that certain cause wherein they are plaintiffs, and the said H. C. Crary, Eugene Heini-
76 man, Jones Taliaferro, Charles Spence, *et als.*, are defendants, and are required by the order granting said appeal to the Supreme Court of the Territory of New Mexico, to give security for the costs to be incurred arising out of such appeal in the event said appeal shall be dismissed and decided adversely to them, and to pay also the costs of the district court which were adjudged by said judgment and decree against them;

Now, therefore if the said above bounden principals shall well and truly pay or cause to be paid, all costs which may be adjudged against them by the said Supreme Court of the Territory of New Mexico, in the event said appeal shall be dismissed, and shall also pay and satisfy any and all costs remaining unpaid in the district court which they may be adjudged to pay, then this obligation to be null and void, otherwise to remain in full force and effect.

(Signed) WM. B. CHILDERS. [SEAL.]
(Signed) ALEX. BRISACKER. [SEAL.]
(Signed) WALLACE HESSELDEN. [SEAL.]

TERRITORY OF NEW MEXICO, *County of Bernalillo, ss:*

On this 8th day of November, A. D. 1902, before me personally appeared W. B. Childers, Alex. Brisacker, and Wallace Hesselden, to me known to be the same persons described in and who executed the foregoing bond, and they acknowledged to me that they executed the same as their free act and deed.

And the said Alex. Brisacker and Wallace Hesselden sureties upon said bond, being by me each severally sworn, did say, each for himself, and not one for the other, that he is worth the amount set opposite to his name below in property situate in the Territory of New Mexico, over and above his just debts and liabilities, and the
77 amount by law exempt from execution and forced sale.

(Signed) A. BRISACKER. $250.
(Signed) WALLACE HESSELDEN. $250.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year last above written.

(Signed) E. L. MEDLER,
[OFFICIAL SEAL.] *Notary Public.*

The above and foregoing bond, as to sufficiency and form approved by me, this the 29th day of November, A. D. 1902.

(Signed) JOHN E. GRIFFITH, *Clerk.*

(Endorsed:) No. 3319. Territory of New Mexico, County of Socorro. In the District Court. Benjamin F. Dye, *et al.*, Plaintiffs, *vs.* B. C. Crary, *et al.*, Defendants. Appeal bond of costs. Filed in my office Nov. 29, 1902, John E. Griffith, Clerk.

And thereafter, to-wit: on the 5th day of December, A. D. 1904, there was filed in the office of the District Clerk the following mandate, which said mandate — in the words and figures to-wit:

The Territory of New Mexico to the District Court sitting within and for the County of Socorro, in the Third Judicial District, Greeting:

Whereas, In a certain cause lately pending before you, wherein H. C. Crary *et als.*, were plaintiffs, and Benjamin H. Dye, *et als.*, were defendants, by your consideration in that behalf, judgment was entered against the said defendants; and

Whereas, The said cause and judgment were afterwards
78 brought into our Supreme Court for review by appeal, whereupon such proceedings were had in said Supreme Court that at the January, 1904, term thereof, on the 29th day of said term, the same being October 17th, 1904, it was considered that the judgment aforesaid, by you in form giving, be reversed and that the said cause be remanded to you with directions to proceed further in accordance with the opinion of the court herein.

Now, therefore, You are hereby commanded to reinstate said cause

upon your docket and proceed further in accordance with the opinion of the court herein.

Witness: The Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and the Seal of said Court, this 29th day of November, A. D. 1904.

[SEAL.] JOSÉ D. SENA, *Clerk.*

(Endorsed:) No. 3319. B. Dye *et al., vs.* H. D. Crary *et al.* Mandate. Third Judicial District Court, County of Socorro. Filed in my office this 5th day of December, 1904. William E. Martin, Clerk. By —— ——, Deputy.

And be it further remembered, That at a regular term of the District Court of the Third Judicial District of the Territory of New Mexico, sitting in and for the County of Socorro, and on the 4th day of said term, the same being Thursday, June the 8th, the following entry was made, to-wit:

No. 3319.

BENJAMIN H. DYE ET AL.,
vs.
H. C. CRARY ET AL.

Now it is ordered by the court that this cause be set for trial for the third Monday, the same being June the 9th, A. D. 1905, of the present term.

79 And afterwards, to-wit: On the 19th day of said term, the same being June the 19th, A. D. 1905, the following entry was had and entered of record, to-wit:

No. 3319.

BENJAMIN H. DYE and WILLIAM B. CHILDERS, Plaintiffs,
vs.
H. C. CRARY, JOSEPH SPENCE, CHARLES SPENCE, JONAS TALIAFERRO, H. B. FERGUSSON, ET AL., Defendants.

Change of Venue from Lincoln County, No. 1267.

And now on this day, upon the mandate of the Supreme Court of New Mexico, filed herein on the 5th day of December, A. D. 1904.

This cause is ordered reinstated upon the docket of this court: and now the parties, the Plaintiffs by William B. Childers, Esq., their attorney, and the Defendants by H. B. Fergusson, Esq., their counsel, and all parties announcing themselves ready for trial, and issue being joined, there comes the following jury, to-wit:

1. Abran Torres,
2. Maximo Ortega,
3. Jose Armijo,
4. Melvin Swalpp,
5. Grant Milligan,
6. Maximiliano Carrillo,
7. Augustin Pais,
8. Esmel Aragon,
9. Ricardo Ortega,
10. Juan Sanchez,
11. Mauricio Gallegos,
12. James Paterson.

twelve good and lawful men taken from the body of the County of Socorro, duly selected, drawn, accepted, empanelled and sworn to well and truly try the issues joined in this cause pending, and a true verdict render according to the law and the evidence submitted; and now the jury having heard only a part of the evidence, and the trial of this cause not being concluded, after being fully instructed by the court, are allowed to separate, and retire, until the incoming of court, tomorrow morning at 9 o'clock.

And afterwards, to-wit: On the Fourteenth day of said
80 term, the same being June the 20th, A. D. 1905, the following entry appears, to-wit:

No. 3319.

BENJAMIN H. DYE and WILLIAM B. CHILDERS, Plaintiffs,
vs.
H. C. CRARY, JOSEPH SPENCE, CHARLES SPENCE, JONES TALLIAFERRO, H. B. FERGUSSON, ET AL., Defendants.

Change of Venue from Lincoln County. No 1267.

Come the parties by their attorneys, and comes the jury heretofore empanelled herein, and this trial proceeds; and the jury not having heard all of the evidence, and the trial of this cause not being concluded, after being fully instructed by the court, are allowed to separate and retire until the incoming of court, tomorrow morning at 9 o'clock.

And thereafter, on the fifteenth day of said term, the same being June 21st, A. D. 1905, the following entry appears:

No. 3319.

BENJAMIN H. DYE ET AL.
vs.
H. C. CRARY ET AL.

Change of Venue from Lincoln County. No 1267.

Come the parties and their attorneys, and comes the jury heretofore empanelled herein, and this trial proceeds; now come the Plaintiffs by W. B. Childers, their attorney, and suggests the death of Eugene Heiniman, one of the defendants herein, and moves the

court to dismiss said cause as to the said Eugene Heiniman; and the court having heard said motion, doth sustain the same, whereupon,

It is ordered by the court that this cause be, and the same is hereby dismissed as to Eugene Heiniman, one of the defendants in this cause, and now this trial proceds; and the jury having heard only a part of the evidence, and the trial of this cause not being concluded, after being fully instructed by the court, are
81 allowed to separate and retire until the incoming of the court, tomorrow morning at 9 o'clock.

And thereafter, on the sixteenth day of said term, the same being June the 22d, A. D. 1905, the following entry appears:

No. 3319.

BENJAMIN H. DYE ET AL.
vs.
H. C. CRARY ET AL.

Change of Venue from Lincoln County.

Come the parties and their attorneys, and comes the jury heretofore empanelled herein, and the trial of this cause proceeds; and now comes the plaintiffs, by W. B. Childers, their attorney, and moves the court to strike out testimony of defendant and instruct the jury to find for the plaintiffs herein; and the court having heard said motion read, and having heard the arguments of counsel, and being well and fully advised in the premises, doth sustain said motion;

It is therefore ordered by the court that the plaintiffs' motions be and the same are sustained, whereupon,

The jury returns the following verdict, to-wit:

"No. 3319.

"B. H. DYE ET AL.
vs.
"H. C. CRARY ET AL.

"Under instructions of the court we the jury find the defendants guilty, as charged in the complaint.

"JAMES PATTERSON, *Foreman.*"

Which said verdict is by the court ordered filed, and the jury is by the court ordered discharged from the further consideration of this cause; and the defendants herein given notice of filing a motion for a new trial herein, and leave is given defendants until July 1, A. D. 1905, to file said motion.

And thereafter, June the 27th, 1905, there was filed in the
82 office of the District Clerk of the Third Judicial District, in and for Socorro County, a motion for a new trial, which said motion is in words and figures as follows, to-wit:

In the District Court for the County of Socorro, Territory of New Mexico.

No. —.

BENJAMIN H. DYE ET AL., Plaintiffs,
vs.
H. C. CRARY ET AL., *et al.*, Defendants.

Ejectment.

Change of Venue.

Motion for a New Trial.

Come now the said defendants, by H. B. Fergusson, their attorney, and move the court to set aside the verdict of the jury and the judgment of the court rendered against them, and grant them a new trial in this cause; and for grounds of this motion they respectfully show to the court:

I.

The court erred in admitting improper evidence on the trial of this cause, offered by the plaintiffs and objected to by the defendants, to which action of the court the defendants then and there duly excepted and still except.

II.

The court erred in rejecting proper evidence offered on the trial of this cause on behalf of the defendants, to which action of the court the defendants then and there duly excepted and still except.

83 III.

The court erred in granting the motion made by the plaintiffs on the trial of this cause to withdraw from the consideration of the jury and strike out the testimony of the witnesses W. A. McIvers, W. M. Despard, F. B. Alexander, Mark Thomas, John H. Robertson, John Haley and Jones Taliaferro, given in behalf of the defendants, and the documentary evidence supporting the same, the said testimony of said witnesses and said documentary evidence being then and there competent, relevant and material to prove

(*a*) the abandonment of the interest of the plaintiff, Benjamin H. Dye in the said Compromise mine;

(*b*) the election of said Benjamin H. Dye made in the case of Jones Taliaferro *vs.* Benjamin H. Dye, then a public record in the District Court of the County of Lincoln, Territory of New Mexico,

wherein the plaintiff, Benjamin H. Dye, in this cause, was and is the defendant Benjamin H. Dye named in said cause, wherein the interest of said Benjamin H. Dye in said Compromise mine had been sold under attachment proceedings therein to pay a debt he owed said plaintiff, Jones Taliaferro, then put into judgment in said cause, to abide by the result of that case and to accept the benefit of the payment of said debt and judgment by the sale of his said interest in said compromise, when he still had ample time to redeem his said interest in said mine from said sale, or to move to set aside said attachment proceedings and the judgment therein as irregular and void.

(*c*) The acquiescence of plaintiff, Benjamin H. Dye, in the judicial sale of his interest in said Compromise mine under the said attachment proceedings and judgment in said attachment
84 suit; to which ruling of the court the defendants then and there duly excepted and still except.

IV.

The court erred in granting the motion made by the plaintiffs in the trial of this cause to withdraw from the consideration of the jury and strike out the testimony of Eugene Heiniman, Harry C. Crary and W. R. Fuston, witnesses for the defendants in this cause, to which ruling of the court the defendants then and there duly excepted and still except.

V.

The court erred in withdrawing from the consideration of the jury and striking out, over the objection of defendants, the documentary evidence received in the trial of this case, on behalf of the defendants, to which ruling of the court the defendants then and there excepted and still except.

VI.

The court erred in ruling out and rejecting the record of the case of Zeigler Bros. *vs.* Benjamin H. Dye, the defendant also in this case, as produced from the records of said Lincoln County District Court, and offered in evidence on the trial of this case on behalf of the defendants, to which ruling of the court the defendants then and there duly excepted and still except.

VII.

The court erred in his conclusion and judgment that upon the whole record of the said case of Jones Taliaferro *vs.* Benjamin H. Dye, the judgment of the District Court for the County of Lincoln, in that case was null and void, and that the judicial sale of the interest of said Benjamin H. Dye in said Compromise mine was an absolute nullity and vested no title to said property in the purchaser
85 of the same at such judicial sale; and that said Dye could, in this ejectment suit, by way of collateral attack on said judgment and judicial sale maintain this suit, notwithstanding the said judgment and judicial sale thereunder still stood unmodified and unreversed on said Lincoln County District records, to which

ruling and decision of the court the defendants then and there duly excepted and still except.

VIII.

The court erred in withdrawing from the consideration of the jury and striking out all the testimony offered and received in the trial of this cause on behalf of the defendants, to which said action of the court the defendants then and there duly excepted and still except.

IX.

The court erred in withdrawing the case from the consideration of the jury and peremptorily instructing the jury to find the defendants guilty, to which action of the court the defendants then and there duly excepted and still except.

X.

The court erred in refusing to grant the motion of the defendants, and overruling the same, to instruct the jury to find the defendants not guilty, to which ruling of the court the defendants then and there duly excepted and still except.

XI.

The verdict in this case is contrary to the evidence.

XII.

The verdict in this case is contrary to the law applicable to the case.

H. B. FERGUSSON,
Attorney for Defendants.

Received copy above motion this 26th day of June, 1905.
W. B. CHILDERS.

86 Endorsed: District Court of Socorro County. Dye *vs.* Crary. Motion for new trial. Third Judicial Court, County of Socorro. Filed in my office June 27, 1905. William E. Martin, clerk. H. B. Fergusson, attorney for defendants.

And thereafter, on the 22d day of said term, the same being July 1, A. D. 1905, the following entry appears:

No. 3319.

BENJAMIN H. DYE and WILLIAM B. CHILDERS, Plaintiffs,
vs.
H. C. CRARY, JOSEPH SPENCE, CHARLES SPENCE, JONES TALIAFERRO, H. B. FERGUSSON ET AL., Defendants.

Change of Venue from Lincoln County. No. 1267.

A verdict having heretofore been rendered in this cause, under instructions of this court in favor of the plaintiffs, and finding the defendants guilty as charged in the complaint, and the defendants having filed a motion for a new trial, and the court having heard counsel for the respective parties on said motion, doth overrule the same; to which action of the court the defendants except.

Now, therefore, in consideration of the premises,

It is considered and adjudged by the court that the plaintiff have and recover from the said defendants an undivided five-sixths of the said "Compromise" mine, described in the complaint of said cause, and situated on the easterly slope of Baxter Mountain, and on the westerly side of Baxter Gulch on said mountain, in the White Oaks mining district, in the County of Lincoln, and Territory of New Mexico, and more particularly described in said complaint, and that plaintiffs have and recover their costs in this behalf expended to be taxed, and that execution issue in favor of said plaintiffs for possession of said property.

87 And thereafter, on the first day of September, there was filed in the office of the District Clerk of said District a motion for allowance of appeal, as follows:

TERRITORY OF NEW MEXICO, *County of Socorro:*

In the District Court.

No. 3319.

B. F. DYE ET AL., Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

Motion for Allowance of Appeal.

Now comes the defendants in the above entitled cause and moves the court to grant them an appeal to the Supreme Court of the Territory of New Mexico, from the judgment and decree of the court rendered in this cause; and upon the filing of an appeal bond for costs, that execution for the costs incurred herein be superseded.

H. B. FERGUSSON,
Attorney for Defendants.

Order Granting Appeal.

This cause coming on to be heard upon the motion of defendants for an order allowing an appeal to the Supreme Court of the Territory of New Mexico, from the judgment and decree of the court rendered in this cause, and the court being now sufficiently advised in the premises, it is ordered that the said motion be granted, and the said defendants be and they are hereby allowed an appeal to the Supreme Court of the Territory of New Mexico from the judgment and decree rendered in this cause.

88 And it is further ordered that defendants file an appeal bond for security for the costs to be incurred on such appeal, and upon the filing of such bond, and approval thereof by the Clerk of this Court, that execution for costs against them herein be stayed and superseded.

Done at Santa Fé, New Mexico, in attendance on the Supreme Court this August 31st, 1905.

FRANK W. PARKER,
District Judge.

Endorsed: No. 3319. District Court of Socorro County. Dye *et al., vs.* Crary *et al.* Motion for and order granting appeal. Filed in my office this the 1st day of September, A. D. 1905. William E. Martin, clerk.

And thereafter, on the 18th day of September, A. D. 1905, there was filed in the office of the clerk of the District Court of said district the following appeal bond for costs, which bond is in words and figures, to-wit:

District Court for Socorro County, New Mexico.

No. 3319.

B. H. DYE ET AL., Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

On Change of Venue from Lincoln County.

Appeal Bond for Costs.

Know all men by these presents, that we, Jones Taliaferro,

89 as principal, for and on behalf of himself and his co-defendants herein, and Charles D. Mayer and Sidney M. Parker, as his sureties, are held and firmly bound unto W. B. Childers and B. H. Dye, as plaintiffs in the above entitled cause, for the payment of any and all costs which might or shall be incurred in an appeal taken from the judgment and decree of the District Court of the Fifth

District within and for the County of Socorro, on change of venue from Lincoln County, rendered in the above entitled cause, and in which the above principals have taken an appeal to the Supreme Court of the Territory of New Mexico, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly and severally by these presents.

Signed, sealed and dated this 31st day of August, A. D. 1905.

The condition of the above and foregoing obligation is such that whereas the above bounden principals, Jones Taliaferro and his co-defendants herein, have taken an appeal from the judgment and decree of the District Court of the Fifth Judicial District of the Territory of New Mexico within and for the County of Socorro, in that certain cause wherein W. B. Childers and B. H. Dye are plaintiffs, and the above bounden principals are defendants, and are required by the order granting said appeal to the Supreme Court of the Territory of New Mexico, to give security for the costs to be incurred arising out of such appeal in the event said appeal shall be dismissed and decided adversely to them, and to pay also the costs of the District Court which were adjudged by said judgment and decree against them;

Now, therefore, if the said above bounden principals shall well and truly pay or cause to be paid all costs which may be
90 adjudged against them by the said Supreme Court of the Territory of New Mexico, in the event said appeal shall be dismissed, and shall also pay and satisfy any and all costs remaining unpaid in the District Court which they may be adjudged to pay, then this obligation to be null and void, otherwise to remain in full force and effect.

JONES TALIAFERRO. [SEAL.]
CHARLES D. MAYER. [SEAL.]
SIDNEY M. PARKER. [SEAL.]

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

On this 31st day of August, A. D. 1905, before me personally appeared Jones Taliaferro, Charles D. Mayer and Sidney M. Parker, to me known to be the same persons described in and who executed the foregoing bond, and they acknowledged to me that they executed the same as their free act and deed.

And the said Charles D. Mayer and Sidney M. Parker, sureties upon the said bond, being by me each severally sworn, did say, each for himself, and not one for the other, that he is worth the amount set opposite to his name below in property situate in the Territory of New Mexico, over and above his just debts and liabilities, and the amount by law exempt from execution and forced sale.

CHARLES D. MAYER, $500.
SIDNEY M. PARKER, $500.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year last above written.

ANDREW H. HUDSPETH,
Notary Public.

[SEAL.]

The above and foregoing bond, as to sufficiency, approved
91 by me this 18th day of September, A. D. 1905.

WILLIAM E. MARTIN, *Clerk.*

Endorsed: No. 3319. District Court. Socorro County. Dye *et al., vs.* Crary *et al.* Appeal bond. Filed in my office this 18th day of September, 1905, William E. Martin, clerk.

And afterwards, to-wit, on the 15th day of September, A. D. 1905, a bill of exceptions in said cause was signed, sealed, made a part of the record and filed in said cause, which bill of exceptions is in the words and figures following, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico Sitting Within and for the County of Socorro.

B. H. DYE ET AL., Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

Bill of Exceptions.

Be it remembered, that heretofore, to-wit, on the nineteenth day of June, A. D. 1905, being the June term, 1905, of the said District Court, this cause came on for trial, and a jury having been duly empanelled and sworn to try the issue in this cause, the following proceedings were had to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico Sitting Within and for the County of Socorro.

No. 3319.

B. H. DYE ET AL., Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

Be it remembered, that on the trial of the above entitled cause the following among other proceedings were had:

92 Be it remembered, That heretofore, to-wit, on the nineteenth day of June, 1905, being the June term, 1905, of the said District Court, this cause came on for trial and a jury having been duly empanelled and sworn to try the issue in this cause, the following proceedings were had to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico Sitting Within and for the County of Socorro.

No. 3319.

B. H. DYE ET AL., Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

Mr. Childers offered in evidence the following stipulation marked Plaintiffs' Ex. A.

In the District Court of the Third Judicial District in and for the County of Socorro, Territory of New Mexico.

No. 3319.

BENJAMIN DYE ET AL.
vs.
HARRY C. CRARY ET AL.

Ejectment Remanded.

Stipulation.

Whereas the above entitled cause was heretofore tried in
93 the District Court for Socorro County, New Mexico, resulting in a verdict for defendants; and whereas on appeal thereto, the Honorable Supreme Court of the Territory of New Mexico reversed and remanded said cause for a new trial, and the same is now pending for such new trial in said District Court for Socorro County;

Now, therefore, it is hereby stipulated and agreed by and between the respective parties to this cause, by their respective attorney of record, that the evidence heretofore taken in this cause in and for the said former trial thereof, whether by the oral testimony of witnesses produced in open court and then examined, or by deposition duly read to the jury on said former trial, or documentary evidence, may be used by either party, whether produced on former trial by plaintiff or defendant, without the production on the second or any subsequent trial thereof, of said witnesses, or the retaking of said depositions, or the production and renewed proof of said documentary evidence, as the same appears in the printed transcript of said cause prepared upon said appeal and used by said Supreme Court of the Territory in considering said cause; subject, however, to any objection by either party that he may desire to make to such evidence on its being offered on such new or subsequent trial, to the same effect as if the said evidence was being offered for the first time or the depositions being read for the first time, except that no exception shall be made to the printed

copies of the documentary evidence that they are not originals. Either party may at his option introduce said witnesses themselves upon said trial but shall not be required to do so; and this stipulation shall not be construed as prohibiting either party
94 from producing and offering new or additional evidence, subject to objection as aforesaid.

(Signed) W. B. CHILDERS,
Attorney for Plaintiffs.

(Signed) H. B. FERGUSSON,
Attorney for Defendants.

Plaintiff- offers in evidence plaintiffs' Ex. A.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Know all men by these presents that we the undersigned citizens of the United States, above the age of twenty-one years, have this the 21st day of April, A. D. 1887, claimed by right of discovery and location and do hereby claim by virtue of such right one thousand one hundred and seventy and two-tent-s feet linear and horizontal measurement in length and two hundred feet in width on the east side of the middle of the vein on this lode and three hundred feet in width on the west side of the middle of the vein on this lode along the course of the same with all its spurs, dips, variations and angles, together with the amount of surface ground as above claimed and described.

This said lode, vein, ledge or deposit hereby located and claimed as aforesaid is situated on the easterly slope of Baxter mountain and the westerly side of Baxter Gulch of said mountain in White Oaks mining district, Lincoln County, Territory of New Mexico, and is more particularly bounded and described as follows, to-wit: Commencing at the discovery and location monument, whence southwest corner "Little Nell" lode claim as officially established bears north 56 degrees 30 minutes east, 125 feet distant, thence north 1 degree 40 minutes west, 155 7/10 feet to the north end
95 center monument, thence north 82 degrees east, 200 feet to the northeast corner monument, thence south 1 degree 40 minutes, east 1,170 2/10 feet to the southeast corner monument, thence south 82 degrees west, 200 feet to the south end center monument, and 500 feet to the southwest corner, thence north 1 degree 40 minutes west, 1,170 2/10 feet to the northwest corner, thence north 82 degree east 300 feet to the north end center the point of beginning. The name of said vein, lode, ledge or deposit, so located, is the Compromise Mining Claim or Lode. Discovered February 1st, 1887. Located April 21st, A. D. 1887.

BENJAMIN H. DYE,
JOHN D. COCKRELL,
THEO. W. HEMAN,
Locators One-third Each.

(Witnesses)
D. J. A. JEWETT.
ED. SCHAFFER.
JOHN K. BYERS.

I hereby certify that since the 21st day of April, A. D. 1887, the date of the above and foregoing mining location, I have given an open cut and tunnel on said claim, exposing mineral in place more than ten feet below the surface.

B. H. DYE.

White Oaks, N. M., May 9, 1887.

Filed May 9th, 1887, 3:30 p. m. Recorded May 9th, 1887.
JONES TALIAFERRO, *Recorder,*
By W. J. TALIAFERRO, *Deputy.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, George Curry, probate clerk and *ex-officio* recorder in and for Lincoln county, New Mexico, do hereby certify that the
96 above is a true and correct copy of Location Notice of the Compromise mining claim as appears in Mining Record Book "O," pages 450 and 451.

—— ——, *Recorder.*

In witness whereof I have hereunto set my hand and affixed my official seal this the 4th day of August, A. D. 1890.

GEORGE CURRY,
Probate Clerk,
By M. A. SISNEROS, *Deputy.*

Plaintiff- offers in evidence Plaintiffs' Ex. B.

Quit Claim Deed from Theo. W. Heman to George B. Barber.

This indenture, made this 24th day of May, 1890, between Theodore W. Heman of White Oaks, of Lincoln County, in the Territory of New Mexico, of the first part, and George B. Barber, of White Oaks, of Lincoln County, in the Territory of New Mexico, of the second part:

Witnesseth, That the said party of the first part in consideration of the sum of thirty and thirty-three-one-hundredths, the receipt of which is hereby acknowledged, does by these presents Remise, Release and Quit Claim unto said party of the second part, his heirs and assigns, all the following described mining claim, situated in the County of Lincoln and Territory of New Mexico, to-wit, a one-sixth interest (1/6) in the Compromise mining claim, being one-half of my one-third interest in said claim, said claim is located on the westerly side of Baxter Gulch in the Baxter mountains, in White Oaks mining district, Lincoln County, New Mexico.

97 To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining forever—

In witness whereof the said party of the first part have hereunto set my hand the day and year first above written.

THOS. W. HEMAN.

Executed and delivered in presence of
E. McB. TIMONEY.
9—406

TERRITORY OF NEW MEXICO, *County of Lincoln ss:*

Be it remembered, that on this 24th day of May, A. D., one thousand eight hundred and ninety, before me, the undersigned, a notary public, in and for said county in the Territory aforesaid, personally came Theo. W. Heman to me, well and personally known as the same person whose name is subscribed to the foregoing deed, and as party thereto acknowledged that he signed, sealed and executed the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Witness my hand and seal the day and year last above written.

MATTHEW H. BELLAMY,
[SEAL.] *Notary Public.*

Filed for record February 5th, A. D. 1891, at 9 o'clock a. m.
GEORGE SENA, *Recorder.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, Isidro L. Analla, probate clerk and *ex-officio* recorder within and for said county, do hereby certify that the above and foregoing copy is a true copy of the original, as the same appears of record in book "N," Record of Deeds, of said county on page 427.

98 Witness my official hand and seal this 22d day of May, A. D., 1901.

ISIDRO L. ANALLA,
Probate Clerk and ex-Officio Recorder,
Per GEORGE SENA, *Deputy.*

10 cents internal revenue stamps affixed and cancelled.
(Seal of Probate Court affixed.)

By the DEFENDANT: It is stipulated and agreed in open court that in lieu of deraignment of the title to that portion of the Compromise Mine in controversy in this case as described in the location notice that at the time and immediately prior to the levy of the attachment in the suit brought in the Lincoln County District Court by Jones Taliaferro against Benjamin H. Dye; that the said Benjamin H. Dye was the owner of an undivided five-sixth interest in and to the said Compromise mining claim.

Plaintiff offered in evidence Plaintiff's Ex. E.

This indenture, made the fourth day of December, in the year of our Lord nineteen hundred, between Benjamin H. Dye, of the town of White Oaks, in the County of Lincoln, and Territory of New Mexico, party of the first part, and William B. Childers, of Albuquerque, in said Territory of New Mexico, party of the second part.

Witnesseth, That the said party of the first part, for and in consideration of the sum of five hundred ($500) dollars lawful money of the United States and other valuable considerations to him in hand paid by the said party of the second part, the receipt whereof

is hereby acknowledged, has granted, bargained, sold remised,
99 released, and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns, an undivided one-half interest of the right, title and interest of the said Benjamin H. Dye, the party of the first part, in and to that certain lode mining claim, called the "Compromise"; situated in the White Oaks Mining District, at or near the town of White Oaks, in the County of Lincoln in the said Territory of New Mexico, as said "Compromise" mine is described in the location notice thereof, of record in the office of the Probate Clerk and *Ex-officio* Recorder of the said County of Lincoln; the interest of the said Benjamin H. Dye being supposed to be a five-sixths undivided interest in and to said mining claim.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz rock and earth therein; and all the rights, privileges, and franchises thereto incident, appendant or appurtenant, or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and, also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, or, in or to the said premises, and every part and parcel thereof, with the appurtenances:

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

BENJAMIN H. DYE.

100 Signed, sealed and delivered in presence of
FRANK J. SAGER.
EUGENE L. STEWART.

(50c I. R. Stamps.)

TERRITORY OF NEW MEXICO, *County of Lincoln:*

On this fourth day of December, 1900, before me personally appeared Benjamin H. Dye, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

Witness my hand and official seal the day and year first above written.

EUGENE L. STEWART,
Notary Public, Lincoln County, N. M.

(Notarial Seal affixed.)

Endorsed: Benjamin H. Dye to William B. Childers. Deed of mining claim. Recorded at the request of B. H. Dye, December 29,

1900, at 1 minute past — o'clock p. m., in Book "S" of Deeds, page 162, Records of the Lincoln County of New Mexico. I. L. Analla, County Recorder.

Plaintiff offers in evidence Plaintiff's Ex. F.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Know all men by these presents, that we, Jones Taliaferro, as principal, and Elbert T. Collier and Paul Nayer as his sureties, residents of the above county and territory, are held and firmly bound unto the Territory of New Mexico in the sum of the three hundred dollars lawful money of the United States for the payment of which sum well and truly to be made we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Signed by us and sealed with our seals this March the 5th, A. D. 1898.

101 The above obligation, however, is upon this condition:

Wher-as, the above principal Jones Taliaferro, has this day sued Benjamin H. Dye in the District Court in and for above County and Territory for the sum of eighty dollars with interest thereon from February 1st, A. D. 1895, and attorney's fees and for the sum of thirty-two and forty-seven one-hundredths dollars, with interest thereon from January 1st, A. D. 1897, by attachment.

Now if the said Jones Taliaferro shall well and truly prosecute this said suit without further delay and with effect and refund all sums of money that may be adjudged to be refunded to the said defendant, Benjamin H. Dye, and pay all damages that may accrue to said defendant or any garnishee by reason of said attachment or any process of judgment thereon then this obligation to be null and void, otherwise to remain in full force and effect.

JONES TALIAFERRO. [SEAL.]
ELBERT T. COLLIER. [SEAL.]
PAUL MAYER. [SEAL.]

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Before me the undersigned notary public, this day personally appeared Jones Taliaferro, who after being by me first duly sworn upon his oath says, that he is the principal in the above and foregoing obligation hereto annexed and also Elbert T. Collier and Paul Mayer, who are personally known to me as said persons, sureties for the said Jones Taliaferro, and who are personally known to me as the persons described in and who executed the attachment bond hereto annexed as such principal and sureties and each for himself and not

102 one for the other says that he executed the above bond as his free act and deed and for the purposes and consideration therein stated, and the said Jones Taliaferro and Elbert T. Collier and Paul Mayer the said sureties, each for himself, says, that he is worth the sum of three hundred dollars, and that he owns property in the above county and territory to that amount over and above

all his just debts and liabilities and exemptions from forced sale under execution and attachment.

JONES TALIAFERRO. [SEAL.]
ELBERT T. COLLIER. [SEAL.]
PAUL MAYER. [SEAL.]

Subscribed and sworn to before me this March the 5th, A. D. 1898.

JOHN H. CANNING,
Notary Public.

(Notarial Seal affixed.)

Endorsed: No. 1145. District Court, Lincoln County. Jones Taliaferro *vs.* Benjamin H. Dye. Attachment bond. Approved by me and filed in my office, March the 8th, 1898. W. W. Driscoll, Clerk.

Mr. Fergusson objects to the introduction of the bond now offered and as I understand it, of the whole record in that case upon the ground that in this attachment suit it is incumbent on the plaintiff to prove that at the time of the filing of this suit as shown by the record that he was then entitled to the possession of that claim; that in addition to the location notice under the mining laws of the United States and Territory of New Mexico it is incumbent on the plaintiff to show that at the institution of this suit he not only had located the claim as shown in the Ex. A. offered, but that he had done the assessment work and preserved his rights under the laws to that claim and was so entitled to the possession at the date
103 of the institution of that suit; that the plaintiff cannot anticipate any possible defense by the defendant and must make his own record and show that he was entitled to the possession as of the date of this suit.

This objection is overruled; it is competent for this plaintiff in this case to introduce this attachment record for the purpose of showing at the time he levied it and took title under the sheriff's deed that is between him and Dye, Dye was the owner at that time, does not make any difference if he never did any assessment, if you can undermine him in some way subsequently as a part of your case that is the proposition.

Objection overruled.

Exception.

The defendant asked leave to withdraw the former stipulation and put in lieu thereof the following:

It is stipulated and agreed in open court that the records upon file in the proper office in Lincoln County show that by virtue of the location notice already in evidence and deeds of conveyance subsequently made appearing of record with the title to the five-sixth interest in the said Compromise mining claim so vested in Mr. Dye in Benjamin H. Dye, one of the plaintiffs prior to the bringing of the said attachment suit, but it is not admitted that he subsequently did

the annual assessment required by law after such title was vested in him.

Plaintiff stipulates that they will agree to proceed with their case under the stipulation as made with the right to offer in evidence, that it shall be considered in evidence without reading the title papers relied upon by them upon a former trial of this case and a part of the record referred to in the stipulation heretofore offered in evi-
104 dence and that all of said title papers shall be considered a part of the record in this case if the plaintiff desired to be included whenever the record is made up as a part of it; deeds and everything that relates to transfer of title in the case.

Plaintiff states that Ex. F. is an attachment bond executed by Jones Taliaferro as principal and Elbert T. Collier and Paul Mayer his sureties, in which is filed in the case of Jones Taliaferro, plaintiff, *vs.* Benjamin H. Dye, and recites the bringing of the attachment suit, bond being given on March the 5th, 1898, for eighty dollars with interest thereon to February 1st, 1895, attorney's fees for the sum of thirty-two dollars and forty-seven cents with interest thereon from January 1st, 1897; the bond was filed and approved by W. W. Driscoll, Clerk.

Defendant objects to his detailing what the bond contains, the bond speaks for itself.

Objection overruled, he is simply describing it.

I also offer in evidence Plaintiff's Exs. A, B, C and D, respectively.

Mr. Fergusson admits that.

PLAINTIFF'S EX. A.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Know all men by these presents that we the undersigned citizens of the United States above the age of twenty-one years, have this the 21st day of April, A. D. 1887, claimed by right of discovery and location and do hereby claim by virtue of such right one thousand one hundred and seventy and two-tenth feet linear and horizontal measurement in length and two hundred feet in width on the east side of the middle of the vein on this lode and three hundred feet in width on the west side of the middle of the vein on this lode along
105 the course of the same with all its spurs, dips, variations and angles, together with the amount of surface ground as above claimed and described.

This said lode, vein, ledge or deposit hereby located and claimed as aforesaid is situated on the easterly slope of Baxter mountain and the westerly side of Baxter Gulch of said mountain in White Oaks Mining District, Lincoln County, Territory of New Mexico, and is more particularly bounded and described as follows, to-wit: Commencing at the discovery and location monument whence southwest corner "Little Nell" lode claim as officially established bears north 56 degrees 30 minutes east, 125 feet distant, thence north 1 degree 40 minutes west, 155 7-10 feet to the north end center monument, thence

north 82 degrees east, 200 feet to the northeast corner monument thence south 1 degree 40 minutes, east 1170 2-10 feet to the southeast corner monument, thence south 82 degrees west, 200 feet to the south end center monument, and 500 feet to the southwest corner, thence north 1 degree 40 minutes west, 1170 2-10 feet to the northwest corner, thence north 82 degrees east 300 feet to the north end center the point of beginning. The name of said vein, lode, ledge or deposit, so located, is the Compromise Mining Claim or Lode. Discovered February 1st, 1887. Located April 21st, A. D. 1887.

BENJAMIN H. DYE,
JOHN D. COCKRELL,
THEO. W. HEMAN,
Locators 1/3 Each.

Witnesses:
D. J. M. A. JEWETT.
ED. SCHAFFER.
JOHN K. BYERS.

106 I hereby certify that since the 21st day of April, A. D. 1887, the date of the above and foregoing miner location I have given an open cut and tunnel on said claim, exposing mineral in place more than ten feet below the surface.

B. H. DYE.

White Oaks, N. M., May the 9th, 1887.

Filed May 9th, 1887, 3:30 p. m. Recorded May 9th 1887.
JONES TALIAFERRO, *Recorder,*
By W. J. TALIAFERRO, *Deputy.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, George Curry, Probate Clerk and *Ex-officio* Recorder in and for Lincoln County, New Mexico, do hereby certify that the above is a true and correct copy of Location Notice of Compromise Mining Claim as appears in Mining Record Book "O" pages 450 and 451.

In witness whereof I have hereunto set my hand and affixed my official seal this the 4th day of August, A. D. 1890.

GEORGE CURRY,
Probate Clerk,
By M. A. SISNEROS, *Deputy.*

PLAINTIFFS' EX. B.

Quitclaim Deed from Theo. W. Heman to George B. Barber.

This indenture, made this 24th day of May, 1890, between Theodore W. Heman, of White Oaks, of Lincoln County, in the Territory of New Mexico, of the first part, and George B. Barber, of
107 White Oaks, of Lincoln County, in the Territory of New Mexico, of the second part:

Witnesseth, That the said party of the first part in consideration of the sum of 30 33-100 dollars, the receipt of which is hereby acknowledged, does by these presents, remise, release, and quitclaim unto said party of the second part, his heirs and assigns all the following described mining claim, situated in the County of Lincoln and Territory of New Mexico, to-wit: a one-sixth interest (1/6) in the Compromise mining claim, being one-half of my one-third interest in said claim; said claim is located on the westerly side of Baxter Gulch in the Baxter mountains in White Oaks Mining District, Lincoln County, New Mexico.

To have and to hold the same together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining forever.

In witness whereof, The said party of the first part *have* hereunto set *my* hand, the day and year first above written.

THEO. W. HEMAN.

Executed and delivered in the presence of
E. McB. TIMONEY.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Be it remembered, That on this 24th day of May, A. D. one thousand eight hundred and ninety, before me the undersigned, a notary public in and for said County in the Territory aforesaid, personally came Theo. W. Heman, to me well and personally known as the same person whose name is subscribed to the foregoing deed, and as party thereto acknowledged that he signed, sealed and executed the
108 said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Witness my hand and seal the day and year last above written.

[SEAL.] MATTHEW H. BELLAMY,
Notary Public.

Filed for record February 5th, A. D. 1891, at 9 o'clock a. m.
GEORGE SENA, *Recorder.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, Isidro L. Analla, Probate Clerk and *Ex-officio* Recorder within and for said county, do hereby certify that the above and foregoing copy is a true copy of the original as the same appears of record in Book "N" records of deeds of said county on page 427.

Witness my official hand and seal this 22nd day of May, A. D. 1901.

ISIDRO L. ANALLA,
Probate Clerk and Ex-officio Recorder,
Per GEORGE SENA, *Deputy.*

10c. Internal Revenue Stamps affixed and cancelled.
(Seal of Probate Court affixed.)

PLAINTIFFS' EX. C.

Notice of Forfeiture.

LINCOLN, LINCOLN COUNTY,
TERRITORY OF NEW MEXICO, *January 24th*, 1896.

To George B. Barber:

You are hereby notified that I have expended during the year 1895, eighty-three dollars and thirty-four cents in labor and improvements upon the Compromise lode mining claim, situated upon the westerly side of Baxter Gulch in Baxter Mountain, White
109 Oaks Mining District, Lincoln County, Territory of New Mexico; sixteen dollars and sixty-six cents of which expenditure, labor and improvements being the proportionate amount due from you in labor and improvements as co-owner of a one-sixth interest in said mining claim, in order to hold said premises under the provisions of Section 2324 of the Revised Statutes of the United States for the year ending December 31st, 1895. And if within ninety days from the service of this notice on you, you fail or refuse to contribute your said proportion of such expenditure as such co-owner, your interest in said claim will become the property of the undersigned and under and by virtue of said Section 2324 of the Revised Statutes of the United States. Executed in duplicate this 24th day of January, 1896.

BENJAMIN H. DYE, *Co-owner.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Jackson P. C. Langston being first duly sworn, says that on the 24th day of January, 1896, at the town of Lincoln in the County of Lincoln and Territory aforesaid, he delivered to the above named George B. Barber, a true and duplicate copy of the above foregoing notice of forfeiture; and further says that he is well and personally acquainted with the said Geo. B. Barber.

J. P. C. LANGSTON.

Subscribed and sworn to before me this 13th day of May, 1896.

J. F. CARPENTER,
Notary Public.

(Notarial Seal affixed.)

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, Benjamin H. Dye, being duly sworn, state that I am the co-owner named in the foregoing notice of forfeiture, that I had
110 the said notice personally served upon the said George B. Barber, co-owner, as set out in said notice, and further state that said Barber failed and refused to pay the said sum of sixteen dollars and sixty-six cents, his proportionate share as co-owner in said Compromise Lode claim within *the* ninety days after the service of said

notice was served upon him, to-wit, on the 24th day of January, 1896, and still at this date fails to pay the same.

BENJAMIN H. DYE.

Subscribed and sworn to before me this 14th day of May, 1896.

J. F. CARPENTER,
Notary Public.

(Notarial Seal affixed.)

Endorsed: Forfeiture notice *In re* Compromise Lode Claim. Benjamin H. Dye to George B. Barber.

Transfer by operation of law, George B. Barber to Benjamin H. Dye.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Filed for record this 27th day of April, A. D. 1897, at 5 o'clock p. m., and recorded in Book "R" on page 107.

D. PEREA,
Probate Clerk and Ex-officio Recorder.
E. W. HURLBERT, *Deputy.*

PLAINTIFF'S EX. D.

Notice of Forfeiture.

WHITE OAKS, N. M., *March* 13, 1891.

To John J. Cockrell and his legal representatives and assigns:

You, and each of you, are hereby notified that the undersigned co-owners in the Compromise Lode Mining Claim, situated on
111 the westerly side of Baxter Gulch in Baxter mountain, in White Oaks Mining District, Lincoln County, Territory of New Mexico, has performed and caused to be performed and expended in labor and improvements upon the said Compromise Lode Mining claim during the year ending December 31, A. D. 1890, the sum of thirty-three dollars and thirty-three and one-third cents, the same being the proportionate amount due from you in labor and improvements upon said claim as co-owner of an undivided one-third interest therein, in order to hold the same under the provisions of Section No. 2324 of the Revised Statutes of the United States, for said year A. D. 1890; and if within ninety days after the full publication of this notice, you fail or refuse to contribute your said proportion of said expenditure as such co-owner, your interest in said claim will become the property of the undersigned as is provided by Section 2324 of the Revised Statutes of the United States.

BENJAMIN H. DYE, *Co-owner.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

INTERPRETER OFFICE,
WHITE OAKS, N. M., *Aug. 8th*, 1891

A. L. McGinnis being duly sworn, deposes and says that he is publisher of the New Mexico Interpreter, a newspaper published at White Oaks, Lincoln County, New Mexico, and that the notice of Benjamin H. Dye to John J. Cockrell to pay for his share of assessment work done upon the Compromise Lode Mining claim, situated on the westerly side of Baxter Gulch in Baxter mountain, was first published in said newspaper in its issue dated March 13th,
112 1891, and was published in each successive weekly issue of said paper for the full period of ninety (90) days, the last publication being in issue dated July 31st, 1891.

A. L. McGINNIS.

Sworn and subscribed to before me this 8th day of August, 1891.

E. McB. TIMONEY,
Notary Public.

(Notarial Seal affixed.)

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Benjamin H. Dye, being duly sworn, says that he is the same person named as co-owner *named* in the within and foregoing published notice of forfeiture to the within named John J. Cockrell, his legal representatives or assignees; that the said John J. Cockrell failed, as also his legal representatives, failed and refused to pay the said within named sum of thirty-three dollars and thirty-three cents so due as in said notice set out, within the time prescribed by law, as in said notice set out, and that no part of the same has yet at this date been paid.

BENJAMIN H. DYE.

Subscribed and sworn to before me this the 6th day of March, A. D. 1894.

J. F. CARPENTER,
Notary Public.

(Notarial Seal affixed.)

Endorsed: *In re* Compromise Lode Mining Claim, White Oaks Mining District, Lincoln County, New Mexico.

Notice of forfeiture by Co-owner.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Benjamin H. Dye to John J. Cockrell.

Transfer by operation of law John J. Cockrell to Benjamin H. Dye.

Filed for record this 28th day of March, A. D. 1894, at
113 4:08 o'clock p. m., and recorded in Book "P" at pages 463.

GEORGE SENA,
Probate Clerk and Ex-officio Recorder,
By E. ELWOOD, *Deputy.*

Plaintiff offers in evidence Plaintiff's Ex. G.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

In the District Court.

JONES TALIAFERRO, Plaintiff,
vs.
BENJAMIN H. DYE, Defendant.

Jones Taliaferro, Plaintiff, complains of Benjamin H. Dye, Defendant, and alleges:

First. That said defendant Benjamin H. Dye, on the first day of February, A. D. 1895, under the name of B. H. Dye, made his certain promissory note in writing and thereby promised two years after date without any relief whatever from valuation or appraisement laws to pay to the order of Taliaferro Bros. partners, the said firm being composed of Jones Taliaferro and M. S. Taliaferro at there store in the town of White Oaks, New Mexico, the sum of eighty dollars ($80.00) with interest thereon at the rate of 12 per cent. per annum from date until paid and attorney's fees, a copy of which said note is hereto at-ached, marked Exhibit "A" and made a part of this complaint, and said defendant then and there delivered said note to Taliaferro Brothers and said Taliaferro Brothers thereafter on the day and year aforesaid endorsed and delivered said note to plaintiff for value received.

Second. That defendant, Benjamin H. Dye, on the first day of January, A. D. 1897, made his certain promissory note in writing and then and there and thereby promised for value received
114 nine months after date to pay to the order of Taliaferro Brothers, partners, said firm being composed of Jones Taliaferro and M. S. Taliaferro, the sum of thirty-two and forty-seven one-hundredths dollars ($32.47) with interest thereon at the rate of 12 per cent. per annum from date until paid. Said note being made under the name of B. H. Dye. And then and there on the said first day of January, A. D. 1897, delivered said note to said firm of Taliaferro Brothers, and said Taliaferro Brothers thereafter on the day and year aforesaid for value received, endorsed and delivered said note

to plaintiff. A copy of said note is hereto attached marked Exhibit "B" and made a part of this complaint.

Third. That there is now due and owing to plaintiff from the defendant, Benjamin H. Dye, on the note first above described the said sum of eighty dollars principal with interest thereon at the rate of 12 per cent. per annum from February 1st, 1895, with reasonable attorney's fees for the collection of the same. And on the said second note above described the sum of thirty-two and forty-seven one-hundredths dollars principal with interest thereon at the rate of 12 per cent. per annum from January 1st, A. D. 1897.

Plaintiff alleges that none of the money due him from defendant on the said notes or either of them has ever been paid.

Wherefore plaintiff prays judgment against said defendant, Benjamin H. Dye on the said first note above described for the sum — eighty dollars with interest thereon at the rate of 12 per cent. per annum from February 1st, A. D. 1895, and a reasonable attorney fee for the collection of same. And on the said second note above described for the sum of thirty-two and forty-seven one-
115 hundredths dollars with interest thereon at 12 per cent. per annum from January 1st, A. D. 1897. For all costs of suit herein and for such other and further relief that plaintiff may be entitled to.

JONES TALIAFERRO, *Plaintiff.*

J. E. WHARTON,
Attorney for Plaintiff.

White Oaks, New Mexico.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Jones Taliaferro being by me first duly sworn, deposes and says: That he is the plaintiff in the above entitled cause and that he has read the above complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be upon information and belief and that as to those matters he believes them to be true.

JONES TALIAFERRO.

Subscribed and sworn to before me this March 5th, A. D. 1898.

JOHN H. CANNING,
Notary Public.

(Notarial Seal affixed.)

EXHIBIT "A."

$80.00. FEBRUARY 1ST, 1895.

Two years after date I promise to pay to Taliaferro Brothers or order, eighty dollars, at their store in White Oaks, New Mexico, for value received without any relief whatever from valuation or appraisement laws with 12 per cent. interest from date until paid, and attorney's fees.

B. H. DYE.

EXHIBIT "B."

$32.47. JANUARY 1ST, 1897.

Nine months after date I promise to pay to the order of
116 Taliaferro Brothers thirty-two and forty-seven one-hundredths dollars, at 12 per cent. interest per annum from date until paid. Value received.

B. H. DYE.

Endorsed: No. 1145. District Court, Lincoln County. Jones Taliaferro *vs.* Benjamin H. Dye. Complaint. Filed in my office, March 8, 1898. W. M. Driscoll, Clerk. J. E. Wharton, White Oaks, N. M., attorney for Plaintiff.

Same objection.
Same ruling as to the admissability of the bond.
Exception.

Plaintiff offers in evidence Plaintiff's Ex. H.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Before me the undersigned notary public in and for the above county and territory this day personally appeared Jones Taliaferro, who is personally well known to me as such person, and who after being by me first duly sworn upon his oath says that Benjamin H. Dye is justly indebted to him in the sum of eighty dollars upon his certain promissory note in writing made and delivered for value received to the firm of Taliaferro Brothers partners, the said firm being composed of James Taliaferro and M. S. Taliaferro and duly endorsed and delivered by Taliaferro Brothers to plaintiff for value received and which said note bears date February 1st, A. D. 1895, with interest thereon from said last above named date at 12 per cent. per annum and reasonable attorney's fees for the collection of same; and also upon his certain promissory note in writing made January 1st, A. D. 1897, for value received to the said firm of Taliaferro Brothers and thereafter duly endorsed by Taliaferro Brothers to plaintiff for value received in the sum of thirty-two and forty-
117 seven one-hundredths dollars with interest thereon at the rate of 12 per cent. per annum from the said last above named date until paid. That the said sums above named are now justly due and owing to plaintiff from defendant, Benjamin H. Dye, together with the interest thereon as above stated and attorney's fees, after allowing all just and lawful offsets, payments and credits; that the said Benjamin H. Dye is now, and for several months past, as plaintiff is informed and believes has been at some place in the State of Ohio, his present place of residence and whereabouts being unknown to plaintiff; that service of process herein cannot be had upon the said Benjamin H. Dye in the ordinary way nor in any way except by publication.

JONES TALIAFERRO.

Subscribed and sworn before me this March 5th, A. D. 1898.

JOHN H. CANNING,
Notary Public.

(Notarial Seal affixed.)

Endorsed: No. 1145. District Court, Lincoln County: Jones Taliaferro *vs.* Benjamin H. Dye. Affi-

Same objection.
Same ruling.
Exception.

Plaintiff offers in evidence Plaintiff's Ex. 1.

The Territory of New Mexico to the Sheriff for the County of Lincoln, Greeting:

You are hereby commanded to attach the goods and chattels, lands and tenements, moneys, effects and credits, in whosoever hands they may be found, of Benjamin H. Dye, or so much thereof, if to be found in your county, as will be sufficient to satisfy the sum of one hundred and twelve and forty-seven one-hundredths dol-
118 lars damages and costs of suit and the same safely keep or so provide that you have the same before the District Court of the Fifth Judicial District of said Territory, within and for the County of Lincoln, on the return day of this writ, and that you also summons the said Benjamin H. Dye, if to be found in your county, to be and appear before the said District Court, on the first return day occurring not less than twenty days after service hereof if the defendant served is a resident of said judicial district, or on the first return day occurring not less than thirty days after service hereof if the defendant served is not a resident of said judicial district, then and there to answer unto Jones Taliaferro in a suit for damages, for one hundred and twelve and forty-seven one-hundredths dollars, together with interest and costs of suit; the first Monday in each month being a return day, and each defendant being required to enter his appearance in the office of the Clerk of the said Court on or before the return day on which this writ is returnable, or judgment by default may be entered against him. And have you then and there this writ.

Wtiness: the Honorable H. B. Hamilton, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fifth Judicial District thereof, and the seal of said District Court, this 8th day of March, A. D. 1898.

W. M. DRISCOLL,
Clerk of said District.

(Seal of Fifth Judical District Court affixed.)

This is an action by attachment, brought to recover the sum of $112.47 claimed to be due and owing on account of two certain

promissory notes made by the defendant in favor of Taliaferro Brothers, by the latter endorsed and transferred to
119 plaintiff, one of said notes being for $80.00, and dated February 1st, 1895, and payable two years after date, and the other of said notes dated January 1st, 1897, and being for $32.47 and payable in nine months after date, both of said notes to bear interest from date at 12 per cent. per annum, and attorney's fees on the first mentioned note. Amount of damages claimed, $112.47, together with interest and costs of suit.

W. M. DRISCOLL, *Clerk.*

Endorsed: No. 1145. District Court, County of Lincoln. Jones Taliaferro *vs.* Benjamin H. Dye. Writ of Attachment and Summons. Original. Filed in my office April 2nd, 1898. W. M. Driscoll, Clerk. J. E. Wharton, White Oaks, N. M., Attorney for plaintiff.

Attached to the above is the following:

TERRITORY OF NEW MEXICO, *County of Lincoln:*

In the District Court.

JONES TALIAFERRO, Plaintiff,
vs.
BENJAMIN H. DYE, Defendant.

Sheriff's Return.

This certifies that the writ of attachment and summons in the above styled cause was received by me on March 15th, 1898, and duly executed by me on said date by levying upon and attaching all the right, title and interest of the defendant, Benjamin H. Dye, in deed to the following described land and real estate, to-wit: The undivided one-half of lots two (2) eight (8) and eleven (11) in section twenty-five (25) and the southwest quarter of the southeast quarter of section twenty-four (24) all in Township six (6) south, range eleven (11) east, in Lincoln County, New Mexico;
120 that I posted on said land a written notice of said attachment, no person being in charge of same or found thereon and that the defendant, Benjamin H. Dye is not in my county and supposed to be in the State of Ohio.

EMIL FRITZ, *Sheriff,*
By P. S. TATE, *Deputy.*

This March 16th, 1898.

Sheriff's Fees.

Mileage	$10.00
Posting notice	1.00
Return	.50
	$11.50

Plaintiff offers in evidence Plaintiff's Ex. J.

Territory of New Mexico to the Sheriff for the County of Lincoln, Greeting:

You are hereby again commanded to attach the goods and chattels, lands and tenements, moneys, effects and credits, in whosoever hands they may be found, of Benjamin H. Dye, or so much thereof if to be found in your county, as will be sufficient to satisfy the sum of one hundred twelve and forty-seven one-hundredths dollars damages and cost of suit, and the same safely keep or so provide that you have the same before the District Court of the Fifth Judicial District of said Territory within and for the County of Lincoln, on the return day of this writ, and that you also summons the said Benjamin H. Dye, if to be found in your county, to be and appear before the said District Court, on the first return day occur-
121 ring not less than twenty days after service hereof if the defendant served is a resident of said Judicial District, or on the first return day occurring not less than thirty days after service hereof if the defendant served is not a resident of said Judicial District, then and there to answer unto Jones Taliaferro in a suit for damages for one hundred and twelve and forty-seven one-hundredths dollars, together with interest and costs of suit; the first Monday in each month being a return day, and each defendant being required to enter his appearance in the office of the Clerk of said Court on or before the return day on which this writ is returnable, or judgment by default may be entered against him. And have you then and there this writ.

Witness, the Honorable H. B. Hamilton, associate justice of the Supreme Court of the Territory of New Mexico, and judge of the fifth judicial district court thereof, and the seal of said District Court this 11th day of May, A. D. 1898.

W. M. DRISCOLL,
Clerk of said District Court.

(Seal of Fifth Judicial District Court affixed.)

This is an action of assumpsit by attachment, brought to recover the sum of $112.47, claimed to be due and owing on account of two certain promissory notes made by the defendant in favor of Taliaferro Brothers, and by the latter endorsed and transferred to plaintiff, one of said notes being for $80.00 and dated February 1st, 1895, and payable two years after date, and the other of said notes dated January 1st, 1897, being for $32.47, and payable in nine months after date, both of said notes to bear interest from
122 date at 12 per cent. per annum, and attorneys fees on the first mentioned note. Amount of damages claimed, $122.47, together with interest and costs of suit.

W. M. DRISCOLL, *Clerk.*

Endorsed. No. 1145. District Court, County of Lincoln. Jones Taliaferro *vs.* Benjamin H. Dye. Alias writ of attachment and summons. Original. Filed in my office June 13, 1898. W. M. Driscoll, clerk. J. E. Wharton, White Oaks, N. M., attorney for plaintiff.

Attached to the above is the following:

TERRITORY OF NEW MEXICO, *County of Lincoln:*

This certifies that the hereto attached Alias Writ of Attachment came to hand May 27th, 1898, and that I executed same by levying upon and attaching all the right, title and interest of Benjamin H. Dye in and to the mine or mining claim known as the Compromise mine, situated on Baxter mountain, in White Oaks mining district, Lincoln County, New Mexico, and that I hold same subject to the order of the court in this cause. This May 28th, 1898.

EMIL FRITZ, *Sheriff,*
By P. S. TATE, *Deputy.*

Plaintiff offers in evidence Plaintiff's Ex. K.

In the District Court, Territory of New Mexico, County of Lincoln, *ss:*

No. 1145.

JONES TALIAFERRO
vs.
BENJAMIN H. DYE.

Comes now the plaintiff, by J. E. Wharton, his attorney, and moves the court for judgment in said above styled cause, and shows to the court the following:

First. He says that service was duly had in this cause by
123 publication, the appearance day being June 4th, 1898, and that the defendant did not enter his appearance herein and has not appeared or answered to this date.

Second. He says the defendant has not traversed the grounds of the attachment as required by law.

Third. The complaint herein is duly verified.

J. E. WHARTON,
Attorney for Plaintiff.

Endorsed: District Court, Lincoln County. Jones Taliaferro *vs.* Benjamin H. Dye. Motion for judgment. Filed in my office, August 19, 1898. John E. Griffith, clerk. J. E. Wharton, White Oaks, N. M., attorney for plaintiff.

Plaintiff offers in evidence Plaintiff's Ex. L.

Proof of Publication.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

John A. Haley, being first duly sworn, deposes and says that he is one of the publishers of the White Oaks Eagle, a newspaper published at White Oaks, in Lincoln County, in the Territory of New

Mexico; that the notice of suit, Jones Taliaferro *vs.* Benjamin H. Dye, No. 1145, of which a copy is hereto attached, was published in said newspaper in its issue dated the 17th day of March, 1898, and was published in each weekly issue of said newspaper for five consecutive weeks thereafter, the full period of thirty days, the last publication thereof being in issue dated the 14th day of April, 1898.

JOHN A. HALEY.

Subscribed and sworn to before me this 23d day of September, A. D. 1898.

EUGENE L. STEWART,
Notary Public.

(Notarial seal affixed.)

124 *Notice of Suit.*

(Pasted to the above is the following:)

In the District Court of the Fifth Judicial District of the Territory of New Mexico Within and for the County of Lincoln.

No. 1145.

JONES TALIAFERRO
vs.
BENJAMIN H. DYE.

The said defendant, Benjamin H. Dye, is hereby notified that a suit of assumpsit by attachment has been commenced against him in the said District Court, within and for the County of Lincoln, Territory aforesaid, by said plaintiff, Jones Taliaferro, to recover the sum of $112.47 claimed to be due and owing on account of two certain promissory notes made by the defendant in favor of Taliaferro Brothers and by the lat-er endorsed and transferred to plaintiff; one of said notes being for $80.00 and dated February 1st, 1895, and payable two years after date, and the other of said notes dated January 1, 1897, being for $32.47, payable in nine months after date, both of said notes to bear interest from date at 12 per cent. per annum, and attorney's fees on first mentioned note.

Damages claimed $112.47, with interest, attorney's fees and cost of suit.

That unless the said defendant enters his appearance in said suit on or before the June, 1898, rule day of this court, the same being the first Monday and the 4th day of June, A. D. 1898, judgment by default will be rendered against him in said cause by default.

Plaintiff's attorney is J. E. Wharton, White Oaks, New Mexico.

W. M. DRISCOLL,
Clerk of said District Court.

125 Endorsed: No. 1145. Filed in my office, December 31, 1898, J. D. Griffith, clerk.

Plaintiff offers in evidence Plaintiff's Ex. M.
(Also being identical in wording with page 259, book G, records of Lincoln County.)

In the District Court of the Fifth Judicial District of the Territory of New Mexico in and for Lincoln County.

No. 1145.

JONES TALIAFERRO
vs.
BENJAMIN H. DYE.

This cause coming on to be heard on the motion of plaintiff, and defendant having failed to answer in the time required by law, it is considered that the defendant is in default for failure to answer; and therefore the court hears the evidence of plaintiff, and assesses the damages of the plaintiff against the defendant, Benjamin H. Dye, upon the two causes of action set forth in the complaint at one hundred and forty-three dollars.

And the court further finds that the grounds of attachment are well taken and true in fact, and the defendant having failed to deny same, it is by the court considered and adjudged that the attachment herein be sustained.

Wherefore, it is by the court considered that the plaintiff have and recover of the said defendant, Benjamin H. Dye, the said sum of one hundred and forty-three dollars ($143) and an attorney's fee of twenty-five dollars, together with all his costs to be hereafter taxed, and that execution issue therefor; and further it is ordered and adjudged by the court that the premises and real estate levied on and attached herein to-wit: the mining claim known as the "Compromise," and situated in White Oaks mining
126 district in Lincoln County, New Mexico, and on Baxter mountain, and also the undivided one-half of lots two (2), eight (8) and eleven (11), in section twenty-five (25), and the southwest quarter of the southeast quarter of section twenty-four (24), township six (6) south, range eleven (11) east, in said Lincoln County, be sold at public auction to the highest bidder for cash by the sheriff of said county, he having given due notice of the time and place of said sale as required by law, and that the proceeds be applied to the payment of plaintiff's debts, attorney's fees and costs of suit and of execution and sale and that the over-plus, if any, be brought into court.

CHARLES A. LELAND, *Judge.*

Endorsed: No. 1145. Lincoln county. Filed in my office this 31st day of December, 1898. J. E. Griffith, clerk.

Plaintiff offers in evidence Plaintiff's Ex. N.

The Territory of New Mexico to the Sheriff of Lincoln County, Greeting:

Whereas, By our writ we lately commanded you, among other things, to attach the goods and chattels, lands and tenements, moneys, effects and credits, in whosoever hands they might be found, of Benjamin H. Dye, or so much thereof, if to be found in your county, as would be sufficient to satisfy the sum of one hundred and twelve and forty-seven one-hundredths dollars damages and costs of suit, and the same safely *kept* or so provide that you should have the same before the District Court of the Fifth Judicial District of said Territory, within and for the County of Lincoln, on the return day of said writ; and whereas, you did on the 13th day of June, 1898, return said writ into the office of the clerk of said
127 court, stating that you had by virtue of said writ to you directed, on the 27th day of May, 1898 levied upon and attached all the right, title and interest of Benjamin H. Dye in and to the mine or mining claim known as the "Compromise," situated on Baxter mountain, in White Oaks mining district, Lincoln County, New Mexico, and that you held the same subject to the order of said court;

Therefore, You are hereby commanded to advertise and sell said lands and tenements according to law, and that you cause to be made thereof the sum of one hundred and forty-three dollars damages and fifty-seven and ninety-five one-hundredths dollars costs of suit, which, by the judgment of said District Court, within and for the County of Lincoln and territory aforesaid, on the 31st day of December, 1898, in vacation, Jones Taliaferro recovered against the said Benjamin H. Dye, with interest thereon from the said 31st day of December, 1898, at the rate of 6 per cent. per annum, and also the costs that may accrue; and due return make of your proceedings on this writ before said District Court within sixty days from the receipt hereof, to render, etc., and have you then and there this writ.

Witness, The Hon. Charles A. Leland, associate justice of the Supreme Court of the Territory of New Mexico, and judge of the Fifth Judicial District Court thereof, and the seal of said District Court this 31st day of December, A. D. 1898.

(Seal of said court affixed.)

JOHN E. GRIFFITH,
Clerk of Said District Court.

(Pasted to the above is the following:)

Sheriff's Sale.

128 Notice is hereby given that I will on February 18th, 1899, at the hour of 10 o'clock a. m., of said day in front of the postoffice in White Oaks, New Mexico, Lincoln County, offer for sale and sell to the highest bidder for cash, at public auction, all the right, title, and interest of Benjamin H. Dye in and to the mining claim known as the Compromise, situated in White Oaks

mining district, Lincoln County, New Mexico, on Baxter mountain, which said property was by me attached in a cause pending in the District Court of Lincoln County, New Mexico, wherein Jones Taliaferro is plaintiff and Benjamin H. Dye is defendant.

Said property will be sold as before stated by order of the District Court to satisfy a judgment in said cause in favor of the plaintiff for two hundred and ninety-five one-hundredths dollars ($200.95) and costs of sale.

This January 10th, 1899.

DEMETRIO PEREA,
Sheriff Lincoln County, New Mexico,
By JOHN W. OWEN, *Deputy.*

Plaintiff's attorney is J. E. Wharton, White Oaks, New Mexico.

(Also pasted to the above writ of *venditioni exponas* is the following:)

In the District Court, County of Lincoln, Territory of New Mexico.

No. 1145.

JONES TALIAFERRO, Plaintiff,
vs.
BENJAMIN H. DYE, Defendant.

Civil Action by Attachment.

We, the undersigned householders of the County of Lincoln, being appointed by the sheriff of said county as appraisers
129 of certain lands and tenements, levied upon and advertised for sale under execution in above cause, do hereby calue and appraise the same as follows, to-wit: All th- right, title and interest of said Benjamin H. Dye in and to the mine or mining claim known as the "Compromise," situated on Baxter mountain, in White Oaks mining district, Lincoln County, New Mexico, as of the cash value of two hundred and fifty dollars.

PAUL MAYER,
URBAIN OZANNE, *Appraisers.*

Subscribed and sworn to before me at said County of Lincoln, this 18th day of February, A. D. 1899.

JOHN W. OWEN,
Deputy Sheriff.

(Written on the back of the said writ is the following:)

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I do hereby certify and return that I received the within execution on the 10th day of January, 1899, and that I executed the

same by advertising the property named in this writ, and which I had then in my possession under attachment herein in the White Oaks Eagle, a newspaper published in the said county; said advertisement beginning in the issue of said paper of January 12th, 1899, and continuing to 16th of February, 1899, inclusive and a copy of which is hereto attached and by having the said property duly appraised as appears by the sworn statement hereto annxed and made a part of this return, and by selling the said property at time and place as advertised, this 18th day of February, 1899,
130 to the highest and best bidder for cash, to-wit: to Jones Taliaferro for the sum of $226.50, being sufficient to satisfy this execution, interest hereon, all costs of sale, and the sheriff's fees herein.

Witness my hand this 18th day of February, 1899.

DEMETRIO PEREA, *Sheriff,*
By JOHN W. OWEN,
Deputy Sheriff.

Endorsed: No. 1145. District Court, Lincoln County. Jones Taliaferro *vs.* Benjamin H. Dye.

Writ of *venditioni exponas.*

Sheriff, levy and collect:

Damages	$143.00
Costs	
Clerk	11.45
Sheriff	11.50
Attorney's fee	25.00
Printer's fee	10.00
Total	$200.95

With interest and your fees on this writ.

J. E. GRIFFITH, *Clerk.*

Filed in my office February 21, 1899, J. E. Griffith, clerk.

Court in recess until 2 o'clock.

Plaintiff offers in evidence Ex. P.

Sheriff's Deed.

Whereas, Jones Taliaferro, of the County of Lincoln, New Mexico, did on the 31st day of December, in vacation, A. D., eighteen hundred and ninety-eight, of the District Court of Lincoln County,
131 in the Territory of New Mexico, recover a judgment against Benjamin H. Dye, late of the said County of Lincoln, for the sum of one hundred and forty-three dollars damages and costs of suit, upon which judgment and execution was issued, dated

the 31st day of December, A. D. eighteen hundred and ninety-eight, directed to the sheriff of Lincoln County to execute, and by virtue of said execution Demetrio Perea, the sheriff of said county, levied upon the premises hereinafter described, to-wit: All the right, title and interest of said B. H. Dye in and to the mine or mining claim known as the "Compromise," situated on Baxter mountain, in White Oaks mining district, Lincoln County, New Mexico; and the time and place of the sale thereof having been duly advertised and said premises having been duly appraised according to law, the same was struck off and sold to Jones Taliaferro, the said plaintiff, he being the highest bidder therefor, and the same being not less than two-thirds the appraised value thereof, for the sum of $227.55, two hundred, twenty-seven and fifty-five one-hundredths dollars.

Now Therefore, Know All Men by These Presents, That I, Demetrio Perea, sheriff of said County of Lincoln and (successor of the said —— ——, late sheriff as aforesaid, in consideration of the premises, and for the further consideration of two hundred, twenty-seven and fifty-five one-hundredths dollars, to me in hand paid by the said Jones Taliaferro, the receipt of which is hereby acknowledged, do hereby convey to the said Jones Taliaferro, his heirs and assigns, the following described lot or parcel of land, to-wit: All the right, title and interest of the said defendant, Benjamin H. Dye, in and to the mine or mining claim known as the "Compromise," situated on Baxter mountain, White Oaks mining district, Lincoln County, New Mexico:

132 To have and to hold the same, with all the appurtenances thereto belonging, to the said Jones Taliaferro, his heirs and assigns forever.

Witness my hand and seal this eighteenth day of February, in the year 1899.

[SEAL.] DEMETRIO PEREA,
By JOHN W. OWENS,
Deputy Sheriff.

TERRITORY OF NEW MEXICO, *County of Lincoln*, ss:

I, Robert E. Lund, a notary public in and for said county, do certify that Demetrio Perea, sheriff of said Lincoln County (by John W. Owen, deputy sheriff of said Lincoln County), personally known to me to be the same person whose name is subscribed to the within deed, appeared before me this day in person and acknowledged that he executed the said deed, as such sheriff, as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal this eighteenth day of February, A. D. 1899.

ROBERT LUND,
Notary Public.

(Notarial seal affixed.)

Endorsed: Sheriff's deed. Sheriff of Lincoln County to Jones Taliaferro.

TERRITORY OF NEW MEXICO, *Lincoln County, ss:*

This deed was filed for record on the 16th day of June, A. D. 1899, and duly recorded in Book — of Page —.

—— ——, *Recorder.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

133 Filed for record this 16th day of June, A. D. 1899, at 5 o'clock p. m. and recorded in Book "R" on page 368.

I. L. ANALLA,
Probate Clerk and ex-officio Recorder,
Per GEORGE SENA, *Depty.*

(50¢. revenue stamp affixed.)

Plaintiff offers in evidence Defendant's Ex. "3."

Sheriff's Deed.

Whereas, Jones Taliaferro, of the County of Lincoln, New Mexico, did, on the 31st day of December, in vacation term, A. D. eighteen hundred and ninety-eight, of the District Court of Lincoln County, in the Territory of New Mexico, recover a judgment against Benjamin H. Dye, late of the said county of Lincoln, for the sum of one hundred and forty-three dollars damages and costs of suit, upon which judgment and execution was issued, dated the 31st day of December, A. D. eighteen hundred and ninety-eight, directed to the sheriff of Lincoln County to execute, and by virtue of said execution Demetrio Perea, then sheriff of said county, levied upon the premises hereinafter described, to-wit: All the right, title and interest of said B. H. Dye in and to the mine or mining claim known as the "Compromise," situated on Baxter mountain, in White Oaks mining district, Lincoln County, New Mexico, and the time and place of the sale thereof having been duly advertised and said premises having been duly appraised according to law, the same was struck off and sold to Jones Taliaferro, the said plaintiff, he being the highest bidder therefor, and the same being not less than two-thirds the appraised value thereof for the sum of $227.55, two hundred and twenty-seven and 55-100 dollars.

Now, Therefore, Know All Men by These Presents, That I,
134 Demetrio Perea, sheriff of said County of Lincoln (and successor of the said ——, late sheriff as aforesaid), in consideration of the premises, and for the further consideration of two hundred, twenty-seven and 55-100 dollars, to me in hand paid by the said Jones Taliaferro, the receipt of which is hereby acknowledged, do hereby convey to the said Jones Taliaferro, his heirs and assigns, the following described lot or parcel of land, to-wit: All the right, title and interest of the said defendant, Benjamin H. Dye, in and to the mine or mining claim known as the "Compromise," situated on Baxter mountain, in White Oaks mining district, Lincoln County, New Mexico;

To Have and to Hold the Same, With all the appurtenances thereto belonging, to the said Jones Taliaferro, his heirs and assigns, forever.

Witness My Hand and Seal this 21st day of December, in the year 1900.

[SEAL.] DEMETRIO PEREA,
Sheriff of Lincoln County, N. M.

(50c. revenue stamps.)

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, I. L. Analla, probate clerk in and for said county do hereby certify that Demetrio Perea, sheriff of said Lincoln County, personally known to me to be the same person whose name is subscribed to the within deed, appeared before me this day in person and acknowledged that he executed the said deed, as such sheriff, as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal this 21st day of December, A. D. 1900.

I. L. ANALLA,
Probate Clerk.

(Seal of probate court affixed.)

135 Endorsed: Sheriff's deed. Demetrio Perea, sheriff of Lincoln County, to Jones Taliaferro. Territory of New Mexico, Lincoln County, *ss:* This deed was filed for record on the 1st day of February, A. D. 1901, at 1 p. m., and duly recorded in Book "S" of Deed R, Page 174. I. L. Analla, recorder.

Plaintiff offers in evidence Defendant's Ex. "4."

(25c. revenue stamp.)

This Lease and Agreement made and entered into this 5th day of June, A. D. 1900, between Jones Taliaferro, of White Oaks, New Mexico, party of the first part, and Harry C. Crary and Eugene Heiniman, of White Oaks, County of Lincoln, New Mexico, parties of the second part;

Witnesseth; That the said party of the first part, for the considerations hereinafter mentioned, has this day leased to the said parties of the second part all his right, title and interest, consisting of an undivided five-sixths interest in the Compromise lode mining claim, situated on Baxter mountain, White Oaks mining district, Lincoln county, New Mexico, and subject to the following conditions and reservations, to-wit:

That the said parties of the second part hereby agree and bind themselves to work and develop the said mining claim during the continuance of this lease and contract, and to keep continuously at work on said claim. It is, however, distinctly understood and agreed that the said parties of the second part also agree and bind themselves to expend in labor at least one hundred dollars on said claim, in any event, and also to make the necessary proof of labor for the annual assessment for the year 1900 on said Compromise claim.

The said party of the first part hereby promises and agrees to deliver to the said parties of the second part a quit claim deed,
136 free of all encumbrances, except as to the United States, conveying all his right, title and interest in and unto the aforesaid five-sixths interest to said Compromise lode mining claim, at any time during the continuance of this lease, on the payment to him of the sum of one thousand, five hundred dollars (1,500), in lawful money of the United States, by the said parties of the second part.

This lease is to continue in full force for a period of six months from the date thereof, provided, however, that in the event of the said parties of the second part discontinuing work on this claim, and remaining discontinued for a period of thirty days, at any time during the six months aforementioned, then and in that event this lease and contract shall become null and void, and the said party of the first part shall be empowered and authorized to take full possession and control of said mining claim, and all rights and privileges accruing to the said parties of the second part under this instrument shall be forfeited and annulled.

In Witness Whereof, We have hereunto set our hands and seals this fifth day of June, A. D. 1900.

Signed and sealed at White Oaks, N. M., in the presence of

[SEAL.] JONES TALIAFERRO.
[SEAL.] HARRY C. CRARY.
[SEAL.] EUGENE HEINIMAN.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

On this fifth day of June, 1900, before me personally appeared Jones Taliaferro, Harry C. Crary and Eugene Heiniman, parties to above written contract and lease, and they acknowledged that they signed, sealed and delivered the above instrument of writing,
137 for the uses, purposes and considerations therein set forth.

Witness my hand and seal the day and year last above written.

JOHN H. CANNING,
(Notarial seal affixed.) *Notary Public.*

Endorsed: Territory of New Mexico, County of Lincoln, *ss:* Filed for record this 26th day of September, A. D. 1900, at 9 a. m., and recorded on the 27th day of September, 1900, in Book D, of Con. and A., on page 222. I. L. Analla, Probate Clerk and *Ex-officio* Recorder, by J. M. Hall, Deputy.

Plaintiff offers in evidence Defendant's Ex. 5.

Quit Claim Deed.

This Indenture, Made the first day of October, in the year of our Lord, one thousand, nine hundred (A. D. 1900), between Jones Taliaferro and Ella M. Taliaferro, his wife, of Lincoln County, New Mexico, parties of the first part, and Harry C. Crary and Eu-

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gene Heiniman, both of said Lincoln County, parties of the second part.

Witnesseth, That the said parties of the second part, in consideration of the sum of one thousand and five hundred ($1,500) dollars, lawful money of the United States of America, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, do by these presents demise, release and forever quit claim unto the said parties of the second part, and to their heirs and assigns, all that certain lot, piece or parcel of land
138 situated in the County of Lincoln and Territory of New Mexico, and bounded and particularly described as follows, to-wit: All and every the right, title and interest of the parties of the first part in and to that certain mining claim located, named and known as the Compromise lode claim, to-wit: That certain five-sixths (5-6) of the whole thereof undivided, and lately the property of one Benjamin H. Dye, and by due process of law levied upon, taken and sold at sheriff's sale by said Jones Taliaferro and by sheriff's deed duly conveyed to said Jones Taliaferro as the purchaser thereof, and lying and being in White Oaks mining district, at or near to the head of the westerly branch of Baxter gulch in Baxter mountain, and lying southerly from the "Little Nell" lode claim (patented), as more fully appears by the location notice thereof by said Benjamin H. Dye and others duly of record in the office of the recorder of said county, and to which reference is hereby had as a part hereof, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof absolutely and forever.

To Have and to Hold, All *the* singular the said premises, together with the appurtenances, unto the said parties of the second part, and unto their heirs and assigns, forever.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

[SEAL.] JONES TALIAFERRO.
[SEAL.] ELLA M. TALIAFERRO.

($1.50 revenue stamps.)

139 TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

On this first day of October, A. D. 1900, before me personally appeared Jones Taliaferro and Ella M. Taliaferro (husband and wife), to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year last above written.

ROB'T E. LUND,
Notary Public.

(Notarial seal affixed.)

Endorsed: Quit claim deed. Jones Taliaferro *et ux.* to H. C. Crary, E. Heniman. Territory of New Mexico, County of Lincoln, *ss:* I hereby certifiy that this instrument was filed for record on the 2d day of November, 1900, at 1 o'clock p. m., and duly recorded in Book S of Records of Deeds, Page- 132-3. I. L. Analla, probate clerk and *ex-officio* recorder. By J. M. Hall, deputy.

Plaintiff offers in evidence Plaintiff's Ex. Q.

Quit Claim Deed.

This Indenture, Made the 28th day of March, in the year one thousand, nine hundred and one, between Harry C. Crary and Katherine M. Crary, his wife, of the first part, and Jones Taliaferro, Charles Spence and Joseph E. Spence, of the second part:

Witnesseth, That the said parties of the first part for and in consideration of two thousand and six hundred dollars, lawful money of the United States, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have
140 remised, released, sold, conveyed and quit claimed and by these presents do remise, release, sell, convey and quit claim unto the said parties of the second part and to their heirs and assigns, forever, all the right, title, interest, claim and demand whatsoever of the said parties of the first part, of, in and to the following described lands, tenements and real estate, to-wit:

The undivided one hundred and eleven*t*, four hundred and thirty-two thousandths (111.432) of the mine or mining claim, named and known as the "Compromise Lode Claim," situated in the White Oaks Mining District, in Lincoln County, New Mexico, and in Baxter mountain, and westerly from the mine known as the "North Homestake" on the westerly branch of Baxter gulch, and southerly from the "Little Nell Lode Claim," and as appears by the location notice of same by Benjamin H. Dye and others of record in the office of the official recorder for said Lincoln County, to which reference is made for full description. This being the same property conveyed to said Harry C. Crary, by deed dated October, 1900, and Eugene Heiniman, of record in the office of probate clerk of said County of Lincoln.

To Have and to Hold, All and singular, the above mentioned and described premises, with the appurtenances and privileges thereunto belonging or in anywise appertaining; and all the estate, right, title, interest and claim whatsoever of the said parties of the first part, either in law or equity, to the only proper use, benefit and behoof of the said parties of the second part, their heirs and assigns forever.

In Witness Whereof, The said parties of the first part have
141 hereunto set their hands and seals the day and year first above written.

[SEAL.] HARRY C. CRARY.
[SEAL.] CATHERINE M. CRARY.

(I. R. stamps $3.00.)

Signed, sealed and delivered in presence of
A. M. BROTHRES.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Be it Remembered, That on this 28th day of March, A. D. one thousand, nine hundred and one, before me, the undersigned, a notary public in and for said county, in the territory aforesaid, personally came Harry C. Crary and Catherine M. Crary, his wife, personally known to me as the persons whose names are subscribed to the foregoing deed, and as parties thereto, and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act and for the uses and purposes therein set forth.

And the said Catherine M. Crary being first by me informed of the contents of the instrument did confess upon an examination separate and independent of her said husband, that she executed the same voluntarily or without the compulsion or illicit influence of her said husband.

Witness my hand and seal the day and year last above written.

JOHN H. CANNING,
Notary Public.

[SEAL.]

Filed for record April 1st, A. D. 1901, at 9 a. m.

I. L. ANALLA, *Recorder.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, I. L. Analla, probate clerk and *ex-officio* recorder in and for the county and territory aforesaid, do hereby certify that the above and foregoing is a true and correct copy of a deed as the same ap-
142 pears of record in my office in Book "S" on Pages 199 and 200 of the Records of said Lincoln County.

Witness my hand and official seal this 9th day of June, A. D. 1902.

I. L. ANALLA,
Probate Clerk and Ex-officio Recorder,
By E. W. HULBERT,
Deputy.

Plaintiff offers in evidence Plaintiff's Ex. R.

Quit Claim Deed.

This Indenture, Made the fifth day of July one thousand nine hundred and one, between Eugene Heiniman and Eunice Heiniman, his wife, of the first part, and Charles Spence, Joseph E. Spence and Jones Taliaferro, of the second part;

Witnesseth, That the said parties of the first part, for and in consideration of seven hundred and fifty dollars, lawful money of the United States, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, *having* remised, released, sold, conveyed, and quit claimed, and by these presents do remise, release, sell, convey and quit claim unto the said parties

of the second part, and to their heirs and assigns forever, all the right, title, interest, claim and demand whatsoever of the said parties of the first part, of, in and to the following described lands, tenements and real estate, to-wit: The undivided one-twelfth (1-12) interest of the mine or mining claim named and known as the "Compromise Mine" or the "Compromise Lode Claim," situated in the White Oaks mining district, Lincoln County, New Mexico,
143 and in Baxter mountain and westerly from the mine known as the North Homestake on the westerly branch of Baxter gulch, and southerly from the "Little Nell" claim, and as appears by the location notice of same by Benjamin H. Dye and others, of record in the office of the official recorder for said Lincoln County, to which reference is made for full description, this being the same property conveyed to said Eugene Heiniman by deed dated October, 1900, by Jones Taliaferro and wife to Harry C. Crary and Eugene Heiniman.

To Have and Hold, All and singular, the above mentioned and described premises with the appurtenances and privileges thereunto belonging or in anywise appertaining; and all the estate, right, title, interest and claim whatsoever of the said parties of the first part, either in law or equity, to the only proper use, benefit and behoof of the said parties of the second part, their heirs and assigns forever.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

[SEAL.] EUGENE HEINIMAN.
[SEAL.] EUNICE HEINIMAN.

Signed, sealed and delivered in the presence of

——— ———.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Be It Remembered, That on this 5th day of July, A. D. one thousand, nine hundred and one (1901), before the undersigned a notary public in and for the said county, in the territory aforesaid, personally came Eugene Heiniman and Eunice Heiniman, his wife, personally known to me as the persons whose names are subscribed to the foregoing deed and as parties thereto, and they acknowledged that they signed, sealed and delivered the said instrument of
144 writing as their free and voluntary act for the uses and purposes therein set forth. And the said Eunice Heiniman being first by me informed of the contents of the instrument, did confess upon an examination, separate and independent of her said husband, that she executed the same voluntarily and without the compulsion or illicit influence of her said husband.

Witness my hand and seal the day and year last above written.

[SEAL.] EUGENE L. STEWART,
Notary Public.

Filed for record July 15th, A. D. 1901, at 9 a. m.
I. L. ANALLA, *Recorder.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, I. L. Analla, probate clerk and *ex-officio* recorder in and for the county and territory aforesaid, do hereby certify that the above and foregoing is a true and correct copy of a deed of record in my office as the same appears recorded in Book S, of the Record of Deeds, on Pages 274 and 275.

Witness my hand and official seal this 9th day of July, A. D. 1902.

I. L. ANALLA,
Probate Clerk and Ex-officio Recorder,
By E. W. HULBERT, *Deputy.*

Plaintiff offers in evidence Plaintiff's Ex. O.

Defendant objects to the admission in evidence of Ex. O being offered upon the ground, first that it is not a part of the judgment roll and cannot be admitted to in any way effect the judgment *venditioni exponas* and the subsequent deeds of the sheriff
145 vesting the title in the purchaser at sale under said *venditioni exponas.*

Second. That no extrinsic evidence is admissible in a suit which is collaterally attacked on a judgment or the judgment in a court of record, but jurisdiction of the court in such proceeding can be determined only by the inspection of the record proper.

Third. Because under collateral attack only the objection—the claim that no jurisdiction existed can only be shown by the record itself.

Fourth. That under collateral attack upon a judgment given upon the ground that the court had no jurisdiction to enter the judgment or decree said jurisdiction is aided by every presumption not inconsistent with the record.

Fifth. Because such presumption is conclusive and cannot be contradicted or overcome by any evidence dehors the record of what is shown by the judgment roll; because the clerk's cost account in such case the judgment attacked collaterally is no part of the record.

By the COURT: It will be overruled at present with leave to argue it at a later time.

Exception.

Plaintiff offers Plaintiff's Ex. O.

Fifth Judicial District, Lincoln County.

No. 1145. 121.

Parties : Jones Taliaferro *vs.* Benjamin H. Dye.
Action : Assumpsit by attachment.
Plaintiff's att'y : J. E. Wharton.
Defendant's att'y : —— ——.
Costs : —.

Date.	Proceedings.	Fees : Clerk, sheriff, witnesses.
1898.		
146	Advance fees, $5.75; paid by plaintiff's attorney, 5-11, paid	$1.50
March 8.	Docket fee, $2.00; filing complaint, 15c	2.15
March 8.	Approving, 50c., and filing, 15c., bond in attachment	.65
March 8.	Filing affidavit for attachment and publication	.15
March 8.	Issuing writ of attachment and summons, $1.00 (Ret. next rule day); one copy, 50c	1.50
March 8.	Issuing notice of suit for publication	1.00
April 2.	Filing sheriff's return D'f't not found. Def't's property (real estate) attached 3, 15, '98	.15
May 11.	Issuing alias writ of attachment, $1.00; one copy, 50c	1.50
June 13.	Filing return on alias writ (attached interest of Def't in Compromise mine on Baxter mountain, White Oaks mining district, Lincoln County)	.15
Aug. 19.	Filing motion for judgment (paid)	.15
Dec. 31.	Fi*F*ling proof of publication (paid)	.15
Dec. 31.	Pub. fee	10.00
Dec. 31.	Filing, 15c.; and entering final judgment (G259)	2.15
Dec. 31.	Paid by plaintiff's attorney	3.90
Dec. 31.	Judgment docket (No. 1—pg. 46)	.50
Dec. 31.	Issuing writ of *venditioni exponas*	1.25
	Paid	$11.45
1899.		
Feb. 21.	Filed return on writ of *venditioni exponas*, showing that the judgment herein was fully satisfied.	
147		

(The above is from "Civil Docket C, Lincoln County, N. M.")

M. B. THOMPSON, a witness called on behalf of the plaintiff, being first duly sworn according to law, upon his oath testified as follows to-wit:

Direct examination by Mr. CHILDERS:

Q. State your name?
A. Mark B. Thompson.
Q. Where do you reside?
A. Alamogordo, New Mexico.
Q. What is your business?
A. I am the deputy clerk of the Sixth Judicial District.
Q. Have you the civil docket and court record, civil docket I am asking you for of the District Court for the County of Lincoln, in which is noted the papers filed in case No. 1145, entitled Jones Taliaferro *vs.* Benjamin H. Dye?
A. I have.
Q. I wish you would produce the book?
A. This is the book.
Q. Turn to the record of that case; this book which you have just produced is the civil docket for the County of Lincoln now in the office of the clerk of the Sixth Judicial District of which the County of Lincoln is a part?
A. It is.

Cross-examination by Mr. FERGUSSON:

Q. Was your attention directed to any particular page?
A. 121 was the page. (See copy of page 121, Exhibit O, page 46 of the record.)

148 Q. That page contained the account of the clerk's costs in that case?
A. It is.

Objected to; book speaks for itself.

By the COURT: It is harmless, the court knows what kind of record this court keeps.

Mr. Childers offers it in evidence.

Mr. Fergusson objects for the same reason detailed above and the additional reason—for the same reason detailed above in making objection to the transcript or printed pages in the transcript containing the clerk's account of costs and I desire to add to that first objection the following; that it is irrelevant and immaterial for the reason that if the law presumes that some paper was filed, if the law presumes in support of a judgment attacked collaterally that some papers necessary to support said judgment was absent from the record that even should anything be found in the clerk's account of costs relative to such paper it still leaves the fact that such paper and every trace of it is absent from the record and therefore does not tend to contradict or overcome the presumption which the law indulges in favor of a judgment in collateral attack.

Objection overruled.

Exception.

JOHN E. GRIFFITH, a witness called on behalf of the plaintiff, being first duly sworn according to law, upon his oath testified as follows, to-wit:

Direct examination by Mr. CHILDERS:

Q. Were you ever clerk of this court, that is to say ever clerk of the judicial district containing the County of Lincoln, the Fifth Judicial District, while Lincoln was part of the Fifth Judicial District?

A. Yes, sir.

Q. When did you become such clerk and when did you
149 cease to be such?

A. I took office the 1st of July, 1898.

Q. When did you cease to be clerk?

A. I think the 2d day of February, 1904.

Q. I will ask you to look at the book which is shown you, civil docket C, Lincoln County, N. M., and state whether that docket was ever in your possession as such clerk of the court as part of its records?

A. Yes, sir; I recognize the book.

Q. For the records of costs pending in Lincoln County at the time you ceased to be clerk?

A. Yes, sir.

Q. I will ask you to look at page 121 of that book purporting to be a record and decree of case 1145, Jones Taliaferro *vs.* Benjamin H. Dye, and state whether there was any other docket kept in said office relative to said cause excepting the docket shown on that page of this book, if so, what?

A. There was no other written docket kept from term to term, there were printed dockets.

Q. But that was simply the title of the case and number for the convenience of the bar and the court?

A. Ordinary printed dockets for the use of the court and members of the court.

Q. That show nothing except the title of the case and number?

A. Yes, sir; and usually the last entry or action done in the case, last entry or last paper filed.

Q. Those dockets were or were not made up from this docket?

A. Well, a part; yes, sir.

Q. Well, I will ask you to look at this page 121 (Exhibit O is shown witness, page 46) about which you have been asked and state what entries if any on that page are in your hand writing?

A. Want me to read them?

150 Q. Yes, sir; and dates?

A. Only along in my handwriting, most of them this business was done under my predecessor; here August 19th, 1898, filing motion for judgment charge of 15c marked paid; December 31st, that is not my handwriting, I recognize that as the handwriting of my wife, who at that time was deputy clerk, that reads December 31st, filing proof of publication 15c, marked paid, under sheriff's fees $10, marked as publisher's fees, and on the same date filing 15c and entering final judgment G 259 $2.15, same date.

Q. Is that in your handwriting?

A. Yes, sir; next is my handwriting, same date, judgment docket No. 1, page 46, 50c; same date in my handwriting issuing writ of *venditioni exponas* $1.25, and there summed up under that date $3.90, marked paid by plaintiff's attorney, December 31st, '98, total costs, it does not show total costs, but the total and footing $11.45 marked paid, you find an entire notation here in my handwriting the date of February 21st, 1899, filing return of writ of *venditioni exponas* shows that the judgment herein was fully satisfied.

Q. Then as I understand you all the entries beginning with the first one under the date of August 19th, 1898, excepting the first one under date of December 31, 1898, which is in the handwriting of your wife, are in your handwriting?

A. Yes, sir.

Q. Is your wife living?

A. No, sir; she is not.

Q. I will ask you if while you were clerk of the court in charge of it there was filed at any time or not any bond in attachment or affidavit in attachment?

Objected to, there is no entry to any such thing and that is
151 a presumption in this case. I object to that question on the ground that it is absolutely incompetent, irrelevant and immaterial because it is an offer to meet some presumption which the law indulges to support and a judgment attacked collaterally.

Overruled.

Defendant excepts.

—. That is overruled just as the others were?

A. Yes, sir.

Q. I will ask you if while you were clerk of the court in charge of it there was filed at any time or not any bond in attachment or affidavit in attachment?

A. I cannot say as to that, I think not.

Move to strike out last part of that answer for the reason that it does not appear but in the mult-udinous duties of the clerk, he might fail to note something.

A. I don't claim to be infallible at all, I tried to be careful.

Q. The record which is before me sets down under date of May 11th, 1898, issuing alias writ of attachment $1.00 one copy 50, $1.50, was that entry made while you were clerk of the court or not?

A. It was made before I was clerk.

Cross-examination by Mr. FERGUSSON:

I would like to ask Mr. Griffith——

Motion withdrawn with privilege of renewing it along with the other questions that I desire, this book about which you have been testifying is the cost book proper?

Object to that, book shows what it is and the court knows what kind of record is kept by this court.

Objection over-ruled.

Plaintiff excepts.

A. Ours as what is called combination cost book and
152 civil docket used for both purposes.

Q. Are the affidavits and affidavits of attachment recorded in this book?

A. They are not recorded, but they are supposed to be a notation of any kind of a paper.

Q. For the purpose of recording the cost, is it?

A. Well, particularly a memorandum, nothing recorded in there, however, except simply notes by the clerk to keep track of the condition of the case and what has been done in the case.

Q. In this entry about which you have testified under date of December 31st, '98, filing an entry final judgment and filing (G259), what does that G 259 mean?

A. That means that the final judgment was to be found recorded in full in book G of the records beginning at page 259.

Redirect by Mr. CHILDERS:

Q. This book is or is not the only record of papers that are filed in a cause and the filing of the same except the notation of filing on the papers themselves that are kept in the clerk's office is it not?

A. Yes, sir.

—. And every file of every paper is supposed to be entered on this record in a case as well as stamped upon the paper itself?

A. The fact of its being upon file is supposed to be noted by the clerk upon that docket.

Q. And that is the only record of that is kept except what is——

Objected to as leading.

Q. State whether or not that is the only record of it, the fact of filing except the notation that is stamped on the paper itself?

A. It is.

153 Recross-examination:

Q. Is there not another docket in which the papers themselves or such papers as the judgments are entered separate from this?

A. Yes, sir, there is what is called a judgment docket giving the substance of what a judgment is from which transcripts are made in order to be filed in the office of the probate clerk so as to being liens upon the real estate of the defendant judgment day and etc.

Q. Is that book G referred to any such a docket?

A. No, sir; that docket is the regular record court record in which all entries court orders are entered.

Redirect:

Q. That includes or not all orders that are made by the court and all final judgments?

A. Includes all orders and recites the trials and verdicts.

Q. Are you familiar with this civil docket, this docket G?

A. Yes, sir; it is G I guess the same one that is referred to.

Q. I would like to have you look at that book G under the head

of case 1145 about which you have been asked and point out each court order recorded therein?

A. What do you mean, in reference to this case?

Q. Yes, sir; you can look at this and tell I guess where to find them.

A. Don't see any except G 259.

Q. Upon that date?

A. That is right here.

Q. Look at plaintiff's Ex. M, pages 241 and 242 of the printed record used in the Supreme Court of the Territory of New Mexico in this case and state whether or not that is the same entry as appears as final judgment in book G page 259?

A. Take quite a little while to compare all that.

Q. You did it once?

154 A. Might have done it long while ago, three years ago.

Q. Appears to be, does it not?

A. If somebody would read one, I would compare the other, I guess I could tell.

Q. I don't know whether I could do that or not, objection might be made that I was reading this.

By Mr. FERGUSSON: I will not make any objection.

A. I would not want to say unless I could compare.

Mr. FERGUSSON: I admit that it is the same I stated so on the stipulation.

A. So far as I have examined, it seems to be the same.

Q. On the face of this printed record?

A. Gives the same title, same number.

Q. Now what other entry is there *there* this entry judgment docket No. 1, page 46, is or is not that a reference to what you would call the judgment lien docket, skeleton of the judgment, stating the names of the parties of suit and account of judgment?

A. Yes, sir; that kind of a docket gives the number of the cause and plaintiff and defendant and style of action and amount of original judgment, amount of costs, how they were incurred, total, rate of interest and the names of the attorneys of the judgment creditor is my recollection.

Q. Supposed to be kept under the provisions of the statute relative to liens of judgment upon real estate?

A. It is the docket that I described awhile ago.

Q. You are an attorney as well as a clerk of the court?

A. Yes, sir.

Q. That is in compliance with that statute?

A. Yes, sir; as I said awhile ago.

Q. State if there are any other entries on this docket G in that cause you have not pointed out?

155 Objected to on the ground that the docket will show for itself.

Objection over-ruled.

Exception.

A. There are none.

Plaintiff offers to read in evidence the deposition of W. M. Driscoll.

Defendant objects to the reading of this deposition, all of which I have read upon the ground detailed above in objection on the same grounds as above as to the admissibility of extrinsic evidence relative to a judgment under collateral attack, that only the record can be inspected to ascertain the jurisdiction or lack of jurisdiction of the court that rendered it.

Objection over-ruled.

Defendant excepts.

If there is no objection in reading this deposition I will omit the certificate of entry, formal matters and come down to the questions and answers.

THE STATE OF TEXAS, *County of El Paso:*

I, Peyton J. Edwards, having been appointed a commissioner to take the testimony of the within named witness upon the interrogatories and cross-interrogatories hereto annexed, do solemnly swear that I will faithfuly perform the duties imposed upon me by the within commission, and I further swear that I am a disinterested person, and in no manner interested in said cause pending between said parties named in said commission.

PEYTON J. EDWARDS.

Subscribed and sworn to before me this the 7th day of June, A. D 1905.

[SEAL.] VOLNEY M. BROWN,
Notary Public, El Paso County, Texas.

156 TERRITORY OF NEW MEXICO, *County of Socorro:*

In the District Court.

No. 3319.

BENJAMIN H. DYE and WM. B. CHILDERS, Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

THE STATE OF TEXAS, *County of El Paso:*

On this the 6th day of June, A. D. 1905, in pursuance to the annexed commission, and the agreement of counsel in above suit, attached to these interrogatories directing me to take the deposition of W. M. Driscoll in answer to the direct interrogatories attached to said commission and agreement of counsel aforesaid, neither the said defendants or their attorneys presenting any cross-interrogatories, I, Peyton J. Edwards, a notary public in and for said County of El Paso, and State of Texas, Commissioner appointed by said commission to take the deposition of said witness, W. M. Driscoll, did cause the said witness, W. M. Driscoll, who I personally know

to come before me at my office in room one in the Bronson Block in the City of El Paso, County of El Paso, and State of Texas, between the hours of ten o'clock a. m. and four o'clock p. m., and the said W. M. Driscoll having been by me first duly sworn to make true answers to said interrogatories answered the same under oath as follows:

To the first interrogatory the witness answers: My name is W. M. Driscoll, I reside in the City of El Paso, Texas, and my occupation is bookkeeper at the El Paso Smelting Works in said City of El Paso.

To the second interrogatory the witness answers: I was clerk of the district court of the fifth judicial district of the Territory of New Mexico, from January 1st, 1898, to July 1st, 1898.

To the third interrogatory the witness answers: I was ap-
157 pointed clerk of said district court May 1st, 1896, and was clerk of said court until July 1st, 1898.

To the fourth interrogatory the witness answers: I have the original docket referred to in this interrogatory in my hand, and I have examined the entries referred to in this interrogatory and I recognize the handwriting in which the entries inquired about in this interrogatory were made from March 8th, 1898, to and -ncluding June 13th, 1898.

To the fifth interrogatory the witness answers: I have designated on the copy of the docket referred to and marked Exhibit A, which is attached to these interrogatories the name of the parties making the entries referred to in this interrogatory on said docket, and make the same a part of my answer hereto. I have marked the entries on said Exhibit A, which were made by me in ink with my initials W. M. D. and the others which were made by Miss Ruby Berry with her name, Miss Ruby Berry on said exhibit.

To the sixth interrogatory the witness answers: I have examined the docket and the entries referred to in this interrogatory, and no bond or affidavit was filed for the alias writ of attachment referred to, and had any been filed record would have been made of it on said docket.

Move to strike out, especially to strike out answer about what he thinks or supposes.

Motion will be partially sustained as to the last sentence of the answer.

Stricken out "And had any been filed record would have been made of it on said docket."

Exception.

Move to strike out the whole answer including the part
158 which says there was not because the whole connection shows that that was but the witness' opinion.

Motion denied.

Exception.

To the seventh interrogatory the witness answers: No bond or affidavit in attachment was filed in said cause, except the bond and affidavit in attachment filed on March 8th, 1898. Had there been any other bond or affidavit filed except this one, record of the same would have been made on the docket.

Mr. FERGUSSON: I move to strike out all of that answer that was similar that was stricken out as to the question before the repetition.

Objection sustained.

Plaintiff excepts.

Defendant moves to strike out all of it on the grounds before stated.

Overruled.

Defendant excepts.

Struck out "Had there been any other bond or affidavit filed except this one, record of the same would have been made on the docket."

Defendant moves to withdraw this deposition from the jury—from the consideration of the jury on the ground that the jury has nothing to do with that question of collateral attack on a judgment that such consideration being wholly a question of law for the court.

Motion denied.

Exception.

By Mr. FERGUSSON: Is the question of collateral attack to be for the consideration of the jury?

By the COURT: It is competent to show as a fact, seems to me, that no affidavit and bond was filed in this cause in support of the alias writ; now, I cannot be sitting up here trying a part of
159 the facts in this case and the jury trying the other part of the facts in this case; the jury will have to find all facts, whether there was any affidavit and under an instruction which I will give them will find whether there is any affidavit for that writ; that is my idea at present.

W. M. DRISCOLL.

Signed and sworn to by said witness, *E.* M. Driscoll, before me this the 6th day of June, A. D. 1905.

[SEAL.] PEYTON J. EDWARDS,
Commissioner and Notary Public in and for
El Paso County, State of Texas.

THE STATE OF TEXAS, *County of El Paso:*

I, Peyton J. Edwards, commissioner and notary public, as aforesaid, do certify that the answers of said witness W. M. Driscoll were reduced to writing by me, and that the same were signed and sworn to by said witness before me on the day and year and at the place stated in the caption hereof.

To certify all which I hereto sign my official signature this 6th day of June, A. D. 1905.

[SEAL.] PEYTON J. EDWARDS,
Commissioner and Notary Public in and for
El Paso County, State of Texas.

(Added in handwriting:)

Fees for taking deposition of W. M. Driscoll.

To 600 words, at 15c. per 100.....$0.90
To certificate and seal..... 50

$1.40

This fee was paid by W. B. Childers.

PEYTON J. EDWARDS,
Commissioner and Notary Public.

160 The Territory of New Mexico to the Peyton J. Edwards, Notary Public, El Paso, Texas, Greeting:

You are hereby authorized and empowered to cause to come before you W. M. Driscoll, resident of El Paso, of the County of El Paso, Texas, at such time and place as you may think most convenient and expeditious; and the said W. M. Driscoll being first sworn to depose the truth answer to take to the accompanying interrogatories and cross-interrogatories to the said W. M. Driscoll in a certain cause now pending in the Third Judicial District Court of the Territory of New Mexico, within and for the County of Socorro, wherein B. H. Dye *et al.* — Plaintiff-, and H. C. Crary *et al.*, defendant-; and having reduced the said answers to writing, you will cause the said witness to sign the same to which you will certify officially; and you shall also sign and certify the said answers officially; after which you will envelope and seal said answers, interrogatories and cross-interrogatories, together with this commission, in a package directed to the clerk of the District Court aforesaid, conforming in all respects to the requisitions of the statute in such cases made and provided.

Witness the Hon. Frank W. Parker, associate justice of the Supreme Court of the said Territory and judge of the Third Judicial District Court thereof, and the seal of said court this 5th day of June, A. D. 1905.

[SEAL.] WILLIAM E. MARTIN, *Clerk.*

161 TERRITORY OF NEW MEXICO, *County of Socorro:*

In the District Court.

No. 3319.

B. H. DYE ET AL.
vs.
H. C. CRARY ET AL.

Stipulation.

It is stipulated and agreed between the parties in the above entitled cause, by their respective attorneys, that a commission may issue upon the attached interrogatories and such cross-interrogatories as may be filed by the defendants on the 5th day of June, A. D.

1905, to Peyton J. Edwards, a notary public, residing at El Paso, State of Texas, and the deposition of W. M. Driscoll, the witness named in the interrogatories, may be taken before the said Edwards, to be used in said cause, when offered in court to be read to all objections that might be made to the questions propounded to said witness and the answers given by the said witness as if the said witness had been examined for the first time in open court in the trial of said cause and objections there made.

W. B. CHILDERS,
Attorney for Plaintiffs.
H. B. FERGUSSON,
Attorney for Defendants.

TERRITORY OF NEW MEXICO, *County of Socorro:*

In the District Court.

No. 3319.

BENJAMIN H. DYE and WM. B. CHILDERS, Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

Notice.

To H. B. Fergusson, Esq., Attorney for Defendants in the Above Entitled Cause:

You are hereby notified that the plaintiffs in said cause
162 will apply to the clerk of the District Court of the Third Judicial District, of the Territory of New Mexico, at Socorro, New Mexico, on the first Monday of June, being the fifth day of June, A. D. 1905, for a commission to take the deposition of W. M. Driscoll, a witness on behalf of the plaintiffs, at El Paso, Texas, upon the accompanying interrogatories; that said plaintiffs will ask to have said commission issued to Peyton J. Edwards, a notary public, residing in the said city of El Paso, and said deposition will be taken at the office of the said notary public in the city of El Paso.

W. B. CHILDERS,
Attorney for Plaintiffs.

Dated Albuquerque, N. M., May 29, 1905.

TERRITORY OF NEW MEXICO, *County of Socorro:*

In the District Court.

No. 3319.

BENJAMIN H. DYE and WM. B. CHILDERS, Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

Interrogatories Submitted to W. M. Driscoll, a Witness on Behalf of the Plaintiff in the Above Entitled Cause.

Interrogatory:

1. State your name, residence and occupation.

2. State what official position, if any, you held in connection with the District Court of the Fifth Judicial District of the Territory of New Mexico in the years 1898 and 1899.

3. If you state that you were clerk of the said District Court, state when you became clerk and when you ceased to be such.

4. Look at the original docket of cause No. 1145, pending in said Fifth Judicial District for the County of Lincoln, in
163 which Jones Taliaferro was plaintiff and Benjamin H. Dye was defendant, brought suit by attachment, and state if you know — whose handwriting the entires in said docket were made, said docket being designated "Civil Docket C, Lincoln County, N. M."

A copy of the said docket referred to is attached to these interrogatories, marked "Exhibit A" and made a part of the same.

5. Designate by marks on the copy herewith attached in whose handwriting the different entries as they appear on the original docket are *in*, if you know such handwriting.

6. Examine the entires under date of April 2d, "Filing sheriff's return Dft. not found. Deft's property (real estate) attached 3, 15, '98, 15c.," and "May 11, Issuing alias writ of attachment, $1.00, one copy 50c.....$1.50," "June 13, Filing return on alias writ (attached interest of Deft. in Compromise mine on Baxter mountain, White Oaks Mining District, Lincoln Co.)....15c.," and under date of "Aug. 19, Filing motion for judgment....15c. pd."

After such examination, state whether any bond or affidavit was filed in said cause for the purpose of having said alias writ of attachment issued.

7. State whether any bond or affidavit for attachment was ever filed in said cause while you were an incumbent of said office of clerk, except the bond referred to in the entry under date of March 8th, 1898, in said docket, being the bond and affidavit which preceded the issuance of the writ of attachment and summons, also referred to and docketed as having been issued said 8th day of March, 1898.

W. B. CHILDERS,
Attorneys for Plaintiffs.

164 PLAINTIFF'S EXHIBIT A.

Fifth Judicial District, Lincoln County.

No. 1145. 121.

Parties: Jones Taliaferro *vs.* Benjamin H. Dye.
Action: Assumpsit by Attachment.
Plaintiff's Attorney: J. E. Wharton.
Defendant's Attorney: —— ——.
Costs: —.

Date.	Proceedings.	Fees: Clerk, sheriff, witnesses.
1898.		
1—	Advance fees, $5.75; paid by P'l'ff's Att'y, 5–11, paid by W. M. D.	$1.50
2—March 8.	Docket fee, $2.00; filing complaint, 15c.; Miss Ruby Berry	2.15
3—March 8.	Approving, 50c., and filing, 15c., bond in attachment; Miss Ruby Berry	.65
4—March 8.	Filing affidavit for attachment and publication; Miss Ruby Berry	.15
5—March 8.	Issuing writ of attachment and summons, $1.00; (Ret. next rule day), one copy, 50c.; Miss Berry	1.50
6—March 8.	Issuing notice of suit for publication W. M. D.	1.00
7—April 2.	Filing sheriff's return D'f't not found. Def't's property (real estate) attached 3, 15, '98	.15
	Miss Ruby Berry	1.50
8—May 11.	Issuing alias writ of attachment, $1.00; one copy, 50c. W. M. D.	1.50
9—June 13.	Filing return on alias writ (Attached interest of Def't in Compromise mine on Baxter mountain, White Oaks Mining District, Lincoln Co.) W. M. D.	.15
Aug. 19.	Filing motion for judgment (pd.)	.15
Dec. 31.	Filing proof of publication (pd.)	.15
Dec. 31.	$10 pub. fee pd. by pl't'ff's att'y Dec. 31, '98.	
Dec. 31.	Filing, 15c., and entering final judgment (G259)	2.15
Dec. 31.	Judgment docket (No. 1—pg. 46)	.50
Dec. 31.	Issuing writ of *venditioni exponas*	1.25
	Paid	$11.45
1899.		
Feb. 21.	Filing return on writ of *venditioni exponas*, showing that the judgment herein was fully satisfied.	

(The above is from "Civil Docket C, Lincoln County, N. M.")

Counsel for plaintiff offers to read in evidence the deposition of Mr. J. E. Wharton.

Objected to for the same ground detailed in the previous objection relative to extrinsic evidence and considering collateral attack on judgment.

Objection overruled. Defendants except.

The deposition of J. E. Wharton was received and read in evidence, as follows:

TERRITORY OF NEW MEXICO, *County of Socorro:*

166 In the District Court, Third Judicial District of New Mexico.

No. 3319.

B. H. DYE ET AL., Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

Answers and deposition of J. E. Wharton, a resident of the town of Alamogordo, County of Otero, Territory of New Mexico, to the accompanying interrogatories propounded to him in the above entitled cause, taken before Earl E. Sidebottom, the commissioner herein, a notary public, duly commissioned, qualified and acting within and for the County of Otero, Territory of New Mexico, in accordance with the accompanying commission, at Alamogordo, in the County of Otero, Territory of New Mexico, on this the 16th day of June, 1905.

Interrogatory 1. State your name, residence and business.

Answer to interrogatory 1. J. E. Wharton, Alamogordo, lawyer.

Interrogatory 2. State whether you were the attorney for the plaintiff in the case of Jones Taliaferro, plaintiff, *versus* Benjamin H. Dye, in a suit brought by attachment in the District Court for the County of Lincoln, at that time in the Fifth Judicial District, suit being brought in the month of March, 1898, and said cause being numbered 1145 on the docket of said court, in which the name of J. E. Wharton appears as plaintiff's attorney.

Answer to interrogatory 2. I was.

Interrogatory 3. If you answer that you were the plaintiff's attorney and that you are the J. E. Wharton whose name is signed to the papers in said cause as such state if you remember of
167 procuring the issuance by the clerk of what is called an alias writ of attachment in said cause.

Answer to interrogatory 3. I do.

Interrogatory 4. If you state that you do remember procuring from the clerk such alias writ of attachment, state whether you at any time filed any other bond in attachment or affidavit in attachment other than the bond and affidavit filed when the suit was first brought and on which the first writ of attachment was based.

Answer to interrogatory 4. My recollection is that I did not.

(Signed) J. E. WHARTON.

TERRITORY OF NEW MEXICO, *County of Otero, ss:*

I, Earl E. Sidebottom, a notary public within and for the County of Otero, Territory of New Mexico, to whom was addressed the commission to take the deposition of one J. E. Wharton, a resident of said county and territory, as to the interrogatories thereto attached, do hereby certify that in pursuance of said commission I caused the said J. E. Wharton, who is to me personally known and known to be the person referred to therein and the person he purports to be, to come before me, at my office, in said county and territory, on the 16th day of June, 1905, who after being first duly sworn to depose the truth, the whole truth and nothing but the truth, in response to the questions propounded in said interrogatories, made answers thereto, which answers were reduced to writing by me as above set forth and attached, and subscribed and sworn to by the said witness before me; and that no attorney or counsel for either party to said suit, nor any other person whomsoever, was present at the taking of said deposition, other than the said witness J. E. Wharton;
168 and that before taking said deposition I subscribed and made oath to the attached affidavit.

Given under my hand and official seal this 16th day of June, 1905.

(Signed) EARL E. SIDEBOTTOM,
[NOTARIAL SEAL.] *Commissioner and Notary Public in and for Otero County, New Mexico.*

TERRITORY OF NEW MEXICO, *County of Otero, ss:*

I, Earl E. Sidebottom, having been appointed a commissioner to take the testimony of the within named J. E. Wharton, upon the interrogatories annexed to said commission do solemnly swear that I will faithfully perform the duties imposed upon me by said commission; and I further swear that I am a disinterested person, and in no manner interested in said cause pending between the parties named in said commission and interrogatories; and that I am a notary public duly commissioned and acting in and for the County of Otero, Territory of New Mexico.

(Signed) EARL E. SIDEBOTTOM.

Subscribed and sworn to before me this 16th day of June, 1905.

(Signed) CARL RUBIN,
[NOTARIAL SEAL.] *Notary Public, Otero County, N. M.*

The Territory of New Mexico to Earl E. Sidebottom, Notary Public, Alamogordo, N. M., Greeting:

You are hereby authorized and empowered to cause to come before you J. E. Wharton, resident of Alamogordo, of the County of Otero, at such time and place as you may think most convenient and
169 expeditious; and the said —— —— being first sworn to depose the truth — answer to take the accompanying interrogatories and cross-interrogatories propounded to the said —— —— in a certain cause now pending in the Third Judicial District Court

of the Territory of New Mexico, within and for the County of Socorro, wherein B. H. Dye *et al.* plaintiffs, and H. C. Crary *et al.* defendants; and having reduced the said answers to writing, you will cause the said witness to sign the same to which you will certify officially and you shall also sign and certify the said answers officially; after which you will envelop and seal said answers, interrogatories and cross-interrogatories, together with this commission, in a package directed to the clerk of the District Court aforesaid, confirming in all respects to the requisitions of the statute in such cases made and provided.

which you will envelop and seal said answers, interrogatories and cross-interrogatories, together with this commission, in a package directed to the clerk of the District Court aforesaid, confirming in all respects to the requisitions of the statute in such cases made and provided.

Witness the Hon. Frank W. Parker, associate justice of the Supreme Court of the said territory and judge of the Third Judicial District Court thereof, and the seal of said court this 14th day of June, A. D. 1905.

[SEAL.] (Signed) WILLIAM E. MARTIN, *Clerk.*

TERRITORY OF NEW MEXICO, *County of Socorro:*

In the District Court.

No. 3319.

B. H. DYE ET AL.
vs.
H. C. CRARY ET AL.

170 *Stipulation.*

It is stipulated and agreed between the parties in the above entitled cause, by their respective attorneys, that a commission may issue upon the attached interrogatories and such cross-interrogatories as may be filed by the defendants, on the 12th day of June, A. D. 1905, to Earl E. Sidebottom, a notary public, residing at Alamogordo, New Mexico, and the deposition of J. E. Wharton, the witness named in the interrogatories, may be taken before the said notary public, to be used in said case, subject, when offered in court to be read, to all objections that might be made, to the questions propounded to said witness and the answers given by the said witness as if the said witness had been examined for the first time in open court in the trial of said cause and the objections there made. And all further notice is waived, said commission to issue on said day as if the required statutory notice had been given.

(Signed) W. B. CHILDERS,
Attorney for Plaintiffs.
H. B. FERGUSSON,
Attorney for Defendants.

This was not received by me until today, as it had been inadvertently mailed to me at Alamogordo, N. M., instead of Socorro, N. M. Socorro, N. M., June 14th, 1905.

(Signed) WILLIAM E. MARTIN, *Clerk.*

TERRITORY OF NEW MEXICO, *County of Socorro:*

In the District Court.

No. 3319.

BENJAMIN H. DYE and WM. B. CHILDERS, Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

171 *Notice.*

To H. B. Fergusson, Esq., Attorney for the Defendants in the Above Entitled Cause:

You are hereby notified that the plaintiffs will apply to the clerk of the District Court of the Third Judicial District of the Territory of New Mexico, at Socorro, New Mexico, in which said cause is pending, for a commission to take the deposition of J. E. Wharton, a witness on behalf of plaintiffs, upon the attached interrogatories; said application for said commission will be made on the 14th day of June, A. D. 1905; commission to issue to Earl E. Sidebottom, a notary public, at Alamogordo, New Mexico, where said deposition is to be taken.

(Signed) W. B. CHILDERS,
Attorney for Plaintiffs.

Dated Albuquerque, N. M., June 9, 1905.

TERRITORY OF NEW MEXICO, *County of Socorro:*

In the District Court.

BENJAMIN H. DYE and W. B. CHILDERS, Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

Interrogatories to be Submitted to J. E. Wharton, a Witness on Behalf of the Plaintiffs in the Above Entitled Cause.

Interrogatory 1: State your name, residence and business.

Interrogatory 2: State whether you were the attorney for the plaintiff in the case of Jones Taliaferro, plaintiff, *versus* Benjamin H. Dye, in a suit brought by attachment in the District Court of the County of Lincoln, at that time in the Fifth Judicial District, suit being brought in the month of March, 1898, and said cause being

numbered 1145 on the docket of said court, in which the name
172 of J. E. Wharton appears as plaintiff's attorney.

Interrogatory 3: If you answer that you were the plaintiff's attorney and that you are the J. E. Wharton whose name is signed to the papers in said cause as such, state if you remember of procuring the issuance by the clerk of what is called an alias writ of attachment in said cause.

Interrogatory 4: If you state you do remember procuring from the clerk such alias writ of attachment, state whether you at any time filed any other bond in attachment or affidavit in attachment other than the bond and affidavit filed when the suit was first brought and on which the first writ of attachment was based.

(Signed) W. B. CHILDERS,
Attorney for Plaintiff.

Endorsed: No. 3319. Territory of New Mexico, County of Socurro, in the District Court. B. H. Dye *et al. vs.* H. C. Crary *et al.* Notice and interrogatories to take deposition of J. E. Wharton. Third Judicial District Court. County of Socorro. Filed in my office June 14, 1905. (Signed) William E. Martin, Clerk. W. B. Childers, Attorney for Plaintiffs.

Whereupon the testimony of the said witness, J. E. Wharton, as given by him upon the former trial of this cause was read by counsel for plaintiffs under the stipulation, as follows:

J. E. WHARTON, called on behalf of the defendants, having been duly sworn in open court, testified as follows:

173 Direct examination by Mr. FERGUSSON:

Q. What is your name?
A. J. E. Wharton.
Q. Residence and occupation?
A. I reside at White Oaks, New Mexico, and am a lawyer.
Q. Were you the attorney of Jones Taliaferro in a suit brought in the spring of 1898 against Benjamin H. Dye, a suit by attachment, in which suit the Compromise mine was levied upon and sold?
A. I was.
Q. State whether or not when the judgment was taken the court inquired into the circumstances concerning the publication of the notice, and alias writ of attachment?
A. I don't remember that the court made any inquiry of me prior to the time that I suggested to the court—that I presented the facts to the court.
Q. You mean to get your judgment?
A. Yes, sir, I remember of presenting the matter to the court.
Q. Were the facts presented to the court?
A. I presented the facts to the court, I remember that; I don't remember of any inquiry of the court prior to that time, prior to

the time that I presented the matter to the court. It was on my suggestion that the matter was considered by the court.

Cross-examination by Mr. CHILDERS:

Q. What did you present to the court in the way of records?
A. Nothing; I didn't make any record in the matter.
Q. There had never been but one advertisement or notice of publication, had there?
A. My recollection, Mr. Childers, is that there was. I had it firmly impressed upon my mind that there was a second advertisement, and I thought that was the record that was here until I came over at this time.
Q. What paper was it published in the second time?
174 A. Well, it must have been in the White Oaks Eagle.
Q. That paper is in existence, isn't it?
A. Yes, sir.
Q. That is a mere matter of recollection on your part?
A. That is all. It is the impression that I had. I was fully convinced of it, though, and thought that was the record until I came.
Q. Merely amounts to an impression?
A. Well, it was a fixed belief until I came here and found that it was not in the record.
Q. The alias writ of attachment was issued upon application to the clerk of the court, was it not, and not to the judge?
A. No; I referred the matter also to the judge.
Q. At the time that the alias was issued?
A. Before it was issued, but my remembrance of it is not clear enough to state whether I had any conversation with the court about it or whether I wrote to him about it. My recollection is that I wrote to the judge and then afterwards to the clerk in regard to it.
Q. Did you procure any order for the issuance of the *venditioni* or not?
A. I think so; I don't remember.
Q. Or was it issued merely by the clerk without any application to the court?
A. My recollection is that I wrote to the court and made the application to the court.
Q. By mail?
A. Yes, sir; I was frequently over here, and sometimes presented things personally to the court, spoke to him about it; was here very frequently during the time of Judge Leland's term, but my recollection is not clear enough to state whether I wrote him as to that matter or whether it was a matter of conversation.
Q. It was clear at the time the judgment was en-
175 tered?
A. I am not positive—it seems Mr. Griffith was—I haven't paid any attention to the records recently to refresh my memory.

That is all.
Plaintiff offers to read in evidence the deposition of Thomas H.

Welsh, given on the original trial on behalf of the defendant part of it.

Object to reading part unless read all.

By the COURT: Of course, if his testimony is relative to two distinct matters, of two distinct subjects, and you wish to introduce it as to one, it would be competent to do so.

Proceed.

By the COURT: He is starting out to read the testimony of this witness Walsh, if he attempts to omit any of it then the question can be raised.

THOMAS H. WALSH, called for the defense, having been duly sworn, testified in open court as follows:

Examined by Mr. FERGUSSON:

Q. What is your name?
A. Thomas H. Walsh.
Q. Where do you live?
A. White Oaks.
Q. How long have you lived there?
A. Four years.
Q. What is your business?
A. Well, I have charge of the Apex Gold Mining Co.'s property there.
Q. What ownership, if any, has that company, or what ownership does it claim to have, in the Compromise mine, part of which is in controversy in this suit?
A. They claim one-sixth.
Q. What relation have you had to the mine, in consequence of being the agent of that company in the past two or three
176 years?
A. I have had charge of their interests in White Oaks.
Q. And what relation did that put you with the mine, whether you were in possession of it, or not?
A. Being in charge of that interest of the Apex mine and looking after their interest, of course I looked after the Compromise part of it.
Q. Who did the assessment work on that mine 1898?
A. I did it for—that is, myself and another party for the Apex Mining Co.
Q. What relation had Mr. T. C. Johns to it?
A. He was manager of the company.
Q. State whether or not Mr. Dye or any one for him did any assessment work on that mine in 1898?
A. No, sir; he did not.
Q. State whether or not the full hundred dollars' worth of work, the full assessment, was done, or whether the mine was fully represented for that year?
A. There was one hundred and three dollars' worth of work done.
Q. By whom?
A. By the Apex Gold Mining Co., with Johns as manager.

By the DEFENDANT: It appearing that the testimony now offered by the plaintiff at this trial is only a part of the testimony given by the said witness Walsh as witness for the defendant in the former trial, the attorney for the defendants now requests the court in view of the fact that attorney for the plaintiffs has introduced said Walsh as his witness and has read only part of his testimony as given on the former trial, the defendant's attorney requests the court to require the gentleman to read all the testimony given on said former trial by the said witness Walsh.

177 Plaintiff's attorney states that this is all of the testimony of said Walsh which he desires to offer on the trial of this suit, that it is read and offered in proof of the fact that the defendants proved upon a former trial of this case, in other words, that they then stated and proved as a fact that the assessment work was done, annual labor was done in the year 1898 by the Apex Gold Mining Co. and co-tenant in common with the defendant Dye in said property in the year 1898; that they are thereby bound by the proof of that fact as an admission by them on the trial of this case and can be proven like any other admission.

Request denied.

Defendant excepts.

By DEFENDANT: I would like to put another additional ground there, because the witness Walsh being absent and having been introduced as to such portions of his answers in his examination at a former trial by the plaintiff here as there witness the right of cross-examination of said witness now introduced as plaintiffs' witness is denied to the defendant.

Request denied.

Exception.

Miss RUBY BERRY, a witness called on behalf of the plaintiff, being first duly sworn according to law upon her oath testified as follows, to-wit:

Direct examination by Mr. CHILDERS:

Q. State your name?

A. Ruby Berry.

Q. State where you reside?

A. In Socorro, N. M.

Q. State whether or not you were employed in the clerk's—in the office of the clerk of the District Court for the Fifth Judicial District at that time here in Socorro in 1898?

A. I was.

178 Q. I wish you would look at page 121 of the records that were kept in that office at that time marked civil docket C, Lincoln County, N. M., and state what entries on that page in case 1145 Jones Taliaferro *vs.* Benjamin H. Dye are in your handwriting?

A. You mean according——

Q. According to date?

A. March 8th there are two entries; and March 8th I just count

them all up can I, on March 8th there are nine I believe and April 2d there is one and I believe that is all—that is all I see.

Q. The entries then which are in your handwriting begin with the first entry?

A. No, sir; the first one is not—only—yes, sir; the first one is the first entry.

Q. Advance fee, $5.75, paid by plaintiff's attorney, 5-11, paid $1.50?

A. No, sir; that is not in my handwriting.

Q. Whose handwriting is that in?

A. I believe that is Mr. Driscoll, who was clerk.

Q. There are under date of March 8th one, two, three, four, four entries are there?

A. Yes, sir.

Q. Those are in your handwriting?

A. Yes, sir.

Q. Is the last one, issuing notice of suit for publication in your handwriting on March 8th?

A. No, sir.

Q. The one April 2d?

A. Yes, sir.

Q. Only one appears on that date is in your handwriting?

A. Yes, sir.

Q. Filing sheriff's return, etc.?

A. Yes, sir; that is mine.

Q. State whether or not any other bond and affidavit of attachment was ever delivered to you or filed in said office that you remember in this cause except the bond and affidavit referred to in the two entires on March 8th in your handwriting?

179 Objected to for the same reason given above.
Objection overruled.
Exception.

Q. Take a look at these two, approving, filing bond in attachment, filing affidavit for attachment, etc.?

A. If any there had been give me it would have been docketed there.

Q. Have you any recollection of any other bond being given you?

A. No, sir; I have not.

Q. At any time?

A. No, sir.

And thereupon the plaintiff rests his case in chief.

Mr. FERGUSSON: I move the court to instruct the jury to find for the defendant in this case.

Jury withdrawn.

Arguments by counsel.

Court in recess until 8 o'clock.

By the COURT: This court is bound by the decision of the Supreme Court, which has determined that this judgment was open to collateral attack and that procedure in the attachment issue was void; that is a settled proposition in this case. As to the admis-

sibility of this testimony, introduction of testimony outside of the record to show that there was no additional affidavit and bond in support of the alias writ, I do not regard it as important, it is harmless to you I believe and while I am not entirely clear as to whether it is competent or admissible I will allow it to remain in the case as it is harmless; therefore both the motions, the motion to instruct the jury for the defendant and the motion to strike out the testimony, extrinsic testimony, extrinsic evidence tending to establish a fact that no ancillary affidavit and bond were filed in support of the alias writ will be denied.

180 Except to the ruling of the court, both points.

Court opened at 9 o'clock, jury brought in.

By DEFENDANT:

Defendant offers in evidence prescribed under the stipulation defendant's Ex. 6.

Objected to as irrelevant, immaterial.

Objection sustained.

By the COURT: The proceedings under the alias writ of attachment in this case have been determined to be void; now the reasons which the parties had for issuing and levying the alias writ of attachment are wholly immaterial; that is a closed book so far as this case is concerned.

Defendant offers in evidence what appears in the transcript of the record that was printed in this case for use in the Supreme Court of the Territory of New Mexico when this case was taken there from the former trial.

Copy of the printed transcript is given to the stenographer and marked for the purpose of identification.

DEFENDANT'S EXHIBIT 6.

258. December 31st, 1898. In Vacation.

In the District Court of the Fifth Judicial District of the Territory of New Mexico Within and for the County of Lincoln.

No. 1142.

ZEIGLER BROTHERS
vs.
BENJAMIN H. DYE.

This cause coming on to be heard on the motion of the plaintiff and the defendant having failed to answer the complaint of the plaintiff which is duly verified within the time given by the law for so doing; it is considered that the defendant is in default

181 for failure to answer and therefore the court hears the evidence of the plaintiff and assesses the damages of the plaintiff against the defendant, Benjamin H. Dye, upon the cause of action set forth in the complaint at seventy-eight and 12-100 dollars.

The court also hears the evidence of the plaintiff and having considered the same and upon the record, finds that defendant has failed to deny the grounds set forth in the affidavit of plaintiff for attachment and that the same are sufficient in law and true in fact; and — is therefore considered and adjudged that the attachment herein be, and the same is hereby, by the court sustained.

Wherefore it is by the court considered that the plaintiff have and recover of the said defendant Benjamin H. Dye the said sum of seventy-eight and 12-100 dollars damages and his costs to be hereafter taxed and that execution issue therefor; and further, it is ordered and adjudged by the court that the premises and real estate levied on herein, to-wit:

The undivided one-half of lots two (2), eight (8), and eleven (11), in Section twenty-five (25) and the southwest quarter of the southeast quarter of Section twenty-four (24) Township six (6) south, Range eleven (11) east, in Lincoln County, *ment* of the judgment to plaintiff, together with his coses and all costs of execution and sale, and that -he overplus, if any, be brought into court.

CHARLES A. LELAND, *Judge.*

(The above is from Book G, page 258, judgment records of Lincoln Co.)

182 Defendant also offers in evidence Defendant's Ex. 7.

DEFENDANT'S EX. 7.

TERRITORY OF NEW MEXICO, *County of Lincoln:*

In the District Court, *ss.*

Ziegler Brothers, partners doing business at White Oaks in the above county and territory, the said partnership being composed of Albert Zeigler and Jacob Zeigler, plaintiff, complains of Benjamin H. Dye, defendant, and alleges:

First. That on divers and sundry dates and times during the year A. D. 1897, prior and up to the twenty-fourth day of August of said year the plaintiff sold and delivered unto the defendant divers and sundry articles of goods, wares and merchandise; that plaintiff sold and delivered same to defendant at his request; that said goods, wares and merchandise so sold and delivered to plaintiff as aforesaid were of the value of seventy-three and 70-100 dollars ($73.70) and that defendant then and there promised to pay plaintiff for said goods, wares and merchandise so sold and delivered to him by plaintiff as aforesaid, the said sum of seventy-three and 70-100 dollars of ($73.70) in lawful money of the United States.

Second. Plaintiff says that none of the money so due plaintiff by defendant for the said goods, wares and merchandise so sold and delivered to defendant by plaintiff as aforesaid had ever been paid, and that there is now due and owing to plaintiff from defendant for the said goods, wares and merchandise the sum of seventy-three and

70-100 dollars ($73.70) with interest thereon at the rate of six per cent. per annum from the 24th day of August, A. D. 1897.

Wherefore plaintiff prays judgment against the said de-
183 fendant Benjamin H. Dye for the sum of seventy-three and 70-100 dollars ($73.70) with interest thereon at the rate of six per cent. per annum from the 24th day of August, A. D. 1897, for all costs of suit herein and for such other and further relief as plaintiff may be entitled to.

ZEIGLER BROS.,
By ALBERT ZEIGLER, *Plaintiff.*

J. E. WHARTON,
White Oaks, N. M., Attorney for Plaintiff.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Albert Zeigler, being first by me duly sworn, deposes and says: That he is a member of the firm of Zeigler Brothers the above plaintiff, that he has read the complaint in above cause by him subscribed and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be upon information and belief and that as to those matters he believes them to be true.

ZEIGLER BROS.,
By ALBERT ZEIGLER.

Subscribed and sworn to before me this February 24th, A. D. 1898.

MATHEW H. BELOMY,
Notary Public.

(Notarial seal affixed.)

Endorsed: No. 1142. District Court, Lincoln County. Zeigler Brothers *vs.* Benjamin H. Dye. Complaint. Filed in my office March 2, 1898. W. M. Driscoll, Clerk.

Territory of New Mexico to the sheriff for the County of Lincoln, Greeting:

You are hereby commanded to attach the goods and chattels, lands and tenements, moneys, effects and credits, in whosoever
184 hands they may be found, of Benjamin H. Dye, or so much thereof, if to be found in your county, as will be sufficient to satisfy the sum of seventy-three and 70-100 dollars damages and costs of suit, and the same safely keep or so provide that you have the same before the District Court of the Fifth Judicial District of said territory, within and for the County of Lincoln, on the return day of this writ, and that you also summons the said Benjamin H. Dye, if to be found in your county, to be and appear before the said district court, on the first return day occurring not less than twenty days after service hereof if the defendant served is a resident of said judicial district, or on the first return day occurring not less than thirty days after service hereof if the defendant served is

not a resident of said judicial district, then and there to answer unto Zeigler Brothers (a co-partnership) in a suit for damages, for seventy-three and 70-100 dollars, together with interest and costs of suit; the first Monday in each month being a return day, and each defendant being required to enter his appearance in the office of the clerk of said court on or before the return day on which this writ is returnable, or judgment by default may be entered against him. And have you then and there this writ.

Witness, The Honorable H. B. Hamilton, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fifth Judicial District Court thereof, and the seal of said
185 district court, this 2nd day of March, A. D. 1898.

W. M. DRISCOLL,
Clerk of said Dist. Court.

(Seal of said Court affixed.)

This is an action of assumpsit by at-achment, brought to recover the sum of $73.70 claimed to be due and owing in account of goods, wares and merchandise, sold and delivered to the defendant by the plaintiff, as set forth in the complaint. Amount of damages claimed, $73.70, together with interest and costs of suit.

W. M. DRISCOLL, *Clerk.*

(Attached to the above writ is the following:)

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

In the District Court.

ZIEGLER BROTHERS, Plaintiff,
vs.
BENJAMIN H. DYE, Defendant.

Sheriff's Return.

This certifies that the writ of attachment and summons in above styled cause was received by me on March 7th, 1898, and duly executed by me on said date, by levying upon and attaching all the right, title and interest of the defendant Benjamin H. Dye in and to the following described land and real estate, to-wit: The undivided one-half of lots two (2), eight (8) and eleven (11) in Section twenty-five (25), and the southwest quarter of the southeast quarter of Section twenty-four (24), all in Township six (6) south,
186 Range eleven (11) east in Lincoln County, New Mexico; that I posted on said land a written notice of said attachment, no person being in charge of same or found thereon. The defendant, not in my county.

EMIL FRITZ, *Sheriff,*
By P. S. TATE, *Deputy.*

This March 8th, 1898.

Sheriff's Fees.

Mileage	$10.00
Posting notice	1.00
Return	.50
	$11.50

Endorsed: No. 1142. District Court, County of Lincoln. Zeigler Brothers *versus* Benjamin H. Dye. Writ of attachment and summons. Original. Filed in my office April 2, 1898. W. M. Driscoll, Clerk. W. E. Wharton, White Oaks, N. M., Attorney for Plaintiff.

Proof of Publication.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Sidney M. Wharton being first duly sworn, deposes and says that he is the publisher of the White Oaks Eagle, a newspaper published at White Oaks, in Lincoln County, in the Territory of New Mexico; that the notice of publication of suit in case of Zeigler Bros., *vs.* Benjamin H. Dye in the District Court, Lincoln County, N.
187 M., of which a copy is hereto attached, was first published in said newspaper in its issue dated the 10th day of March, 1898, and was published in each weekly issue of said newspaper for five consecutive weeks thereafter, the full period of 28 days, the last publication thereof being in the issue dated the 7th day of April, 1898.

S. M. WHARTON.

Subscribed and sworn to before me this 4th day of May, A. D. 1898.

MATHEW H. BELOMY,
Notary Public.

(Notarial seal affixed)

(Pasted to the above is the following:)

Notice of Suit.

In the District Court of the Fifth Judicial District of the Territory of New Mexico Within and for the County of Lincoln.

No. 1142.

ZEIGLER BROTHERS, a Firm Composed of ALBERT ZEIGLER and JACOB ZEIGLER
vs.
BENJAMIN H. DYE.

The said defendant, Benjamin H. Dye, is hereby notified that a suit in assumpsit by attachment has been commenced against him in the said district court within and for the County of Lincoln, Ter-

ritory aforesaid, by the said plaintiff, Zeigler Brothers, to recover the sum of $73.70 claimed to be due and owing on account of goods, wares and merchandise, sold and delivered to the defendant
188 by the plaintiff, as set forth in the complaint.

Damages claimed $73.70, together with interest and costs of suit.

That unless the said defendant enters his appearance in said cause on or before the May, 1898, rule day of this court, the same being the first Monday and the second day of May, A. D. 1898, judgment will be rendered against him in said cause by default.

Plaintiff's attorney is J. E. Wharton, White Oaks, N. M.

W. M. DRISCOLL,
Clerk of said District Court.

Endorsed: No. 1142. Lincoln County District Court. Zeigler Bros. *vs.* Benjamin H. Dye. Proof of Publication. Filed in my office May 9, 1898. W. M. Driscoll, Clerk. Publication fee $10.

In the District Court of the Fifth Judicial District in and for the County of Lincoln, Territory of New Mexico.

ZEIGLER BROS., Plaintiff,
vs.
BENJAMIN H. DYE, Defendant.

Comes now the plaintiff by J. E. Wharton, his attorney, and moves the court for judgment in this cause in favor of plaintiff, and for grounds of said motion shows to the court the following: That said defendant was duly served with process of summons herein by
189 publication more than thirty days before the return day of same, the said return day being May 2nd, 1898; that the defendant has not entered his appearance herein.

2nd Plaintiff further shows that though the time for answering has elapsed, no answer or other pleading on the part of defendant has been filed in this cause.

J. E. WHARTON,
Plaintiff's Attorney.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

J. E. Wharton, being first duly sworn deposes and says, That he is attorney for Zeigler Bros., the above plaintiff; that he has read the above motion for judgment by him subscribed and knows the contents thereof, and that the facts therein stated are true of his own knowledge and as shown by the record in this cause.

J. E. WHARTON.

Subscribed and sworn to before me this 10th day of May, 1898.

WM. M. DRISCOLL,
Clerk District Court, Fifth District of New Mexico.

(Seal of District Court affixed.)

Endorsed: 1142. District Court, Lincoln County. Zeigler Bros. *vs.* Benjamin H. Dye. Motion for Judgment. Filed in my office May 11, 1898, W. M. Driscoll, Clerk. J. E. Wharton, White
190 Oaks, N. M., Plaintiff's Attorney.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

No. 1142.

ZEIGLER BROTHERS
vs.
BENJAMIN H. DYE.

I, W. M. Driscoll, Clerk of the District Court of the Fifth Judicial District of the Territory of New Mexico, within and for the said County of Lincoln, do hereby certify that a complaint together with an affidavit for a writ of attachment and for service by publication, in the above entitled cause, was filed in my office on the 2nd day of March, 1898, that process returnable to a return day occurring not less than twenty days after service if the defendant served is a resident of said judicial district, and to a return day occurring not less than thirty days after service if the defendant served is not a resident of said judicial district, was thereupon on that same day, issued; that it appears from the return made by the sheriff that the said defendant was not found.

I further certify that a notice of this suit for publication was on the 2nd day of March duly issued.

I further certify that it appears from the proof of publication filed in my office on the 9th day of May, 1898, that the said notice was published for the time and in the manner required by law.

I further certify that no appearance for the said defendant
191 has been entered in my office or of record.

Witness my hand and the seal of said district court, this 27th day of May, 1898.

W. M. DRISCOLL, *Clerk.*

(Seal of said Dist. Court affixed)

Endorsed: No. 1142. District Court, Lincoln County. Zeigler Brothers *vs.* Benjamin H. Dye. Certificate of non-appearance. Filed in my office May 27th, 1898. W. M. Driscoll, Clerk.

Objected to on the ground that it is irrelevant and immaterial.
Objection sustained.
Exception.

192 Defendant offers in evidence the testimony of JOHN H. ROBERTSON. Read to the Jury:

Q. State your name, age, residence and occupation?
A. John H. Robertson, age 43, superintendent Austen Coal Co., Old Forge, Penna.
Q. Do you know the parties in this suit, or any of them?
A. Yes.

Q. Are you acquainted, or do you know of, the mining claim known as the Compromise, situated near White Oaks, New Mexico, in litigation in this suit?

A. Yes.

Q. Were you residing or temporarily sojourning, during the months of July and August, 1900, and what business were you engaged in at that place during that time?

A. White Oaks, New Mexico, superintending the operation of the South Homestake Mine, situated at or near White Oaks.

Q. Have you any interest in said Compromise mining claim, or any interest in the result of this litigation?

A. Absolutely none.

Q. Did you meet Benjamin H. Dye, one of the plaintiffs in this suit, while you were at White Oaks, New Mexico, in July and August, 1900?

A. I did.

Q. If you answer the last preceding interrogatory in the affirmative, state whether you conversed with said Benjamin H. Dye during that time concerning said Compromise mining claim; and if so, how many times you so conversed with him?

A. Several times, just how many I do not know.

Q. State fully such conversation or conversations, giving as nearly as you can the time and place and words of such conversation or conversations; and if you cannot recall words, then give the substance and effect of such conversations?

193 A. During the several conversations with Benjamin H. Dye he told me that one time he owned the Compromise, he may have said part of the Compromise; and, that, having met with financial reverses he had lost the property by and through his inability to continue to do the necessary work upon the property as required by law. All conversations I had with Mr. Dye were in and about White Oaks, just where, I cannot recall.

Mr. Childers objects to the question and the answer, upon the ground that it was made to a third party, that it was not intended, and is not shown to have been intended to influence the conduct or action of any of the parties in this case, or that it was expected that it would be repeated to them and that it is wholly irrelevant, immaterial and incompetent, and that the record was open to both parties and that the record, as to showing whether or not he had done any work upon the claim, and that the claim had been represented during each year, was also open to both parties, and it was wholly immaterial so far as the defendants are concerned whether the same had been represented during the years 1898 and 1899 or not and for the further reason that the evidence that the proofs in evidence show that the work was done upon the claims in 1898 by a co-tenant of the plaintiff Dye, and further objection to the admissability of this testimony that at the time these declarations are said to have been made the property was claimed and is alleged to have been in possession of Heiniman and Crary alone, that they have parted with all their interest in the claim since that time and that an estoppel—

equitable estoppel is only available to Heiniman and Crary under such circumstances and in their co-defense is not assignable.

194 By Mr. FERGUSSON: I also offer this in evidence in connection with the statement to the court that I expect to prove in connection with this testimony that Mr. Dye had abandoned this mine and this testimony is admissable in support of that proposition in connection with the status of the record of this case at the present time.

Objection overruled for the time being with the privilege to call it up at some convenient time.

Plaintiff excepts.

Q. If you state in reply to the last preceding question that said Dye stated to you in such conversations that he had lost his interest in the said Compromise mine because of his misfortune in money matters, state also what, if anything, he said about having been unable to do his share of the assessment work on said claim prior to the discovery of which mineral by defendant Crary; and also state what, if anything he said about the attachment suit brought by Jones Taliaferro under which his interest in said claim was sold?

Same objection as made before.

A. Mr. Dye told me at the time he was talking about loosing the property and after Mr. Crary had made the discovery of rich mineral, "He was glad that 'old man Crary' had 'struck it,' as Crary had worked mighty hard and had spent his money in good faith." He further said, "I am mighty glad the 'old man' found something on the property; I never could find anything, but I am interested in property adjoining the Compromise, or in close proximity, and the discovery made by Mr. Crary on the Compromise, will certainly be of benefit to the surrounding properties." On another occasion Mr. Dye said that he was watching the developments and progress

195 being made by Mr. Crary with a great deal of interest, if I remember correctly, his words were, "I am watching things every day very closely;" giving me the impression that his close watch was in the interest of property he spoke of as adjoining the Compromise and in which he had said he had interest, and to see which way the lead was going.

Object to the latter part of the answer upon the additional ground that impressions and conjectures are not admissable in evidence "giving me the impression that his close watch was in the interest of property he spoke of as adjoining the Compromise and in which he had said he had interest, and to see which way the lead was going.

Objection sustained.

Upon objection of plaintiff the court excluded that part of the answer stated in the objection.

Exception.

A. (Continued). Mr. Dye during a conversation said that he was indebted to the Taliaferro people, and that the Taliaferro people had taken the Compromise, or his share therein for the debt. At this particular conversation I did not know that there had been any

forced sale made by legal process, but learned subsequently that such a sale had been made and that Mr. Taliaferro had bought the property at this sale.

Object to that answer for the same reason, same objections that were made to the question and also the further ground as to that part of it as follows. "At this particular conversation I did not know that there had been any forced sale made by legal process, but learned subsequently that such a sale had been made and that Mr. Taliaferro had bought the property at this sale," upon the ground that part of the declaration is absolutely irrelevant and immaterial and
196 the balance of it is hearsay and move to strike out.

The motion to strike out as made will be sustained except as to the first part of the answer, the objection is overruled for the time being.

Q. Do you know, or can you set forth, any other matter or thing which may be of benefit or advantage to the parties at issue in this case, or either of them, or that may be material to the subject of this cause? If yes, set forth the same fully and at large in your answer?

A. I cannot say or remember just how many times I conversed with Mr. Dye. I do remember that after he (Dye) had brought his suit, it was the general topic of conversation of the town.

Objection to as irrelevant and immaterial whether after this suit whether it was general topic of conversation in town or not.

Objection sustained.

This deposition is signed, "John H. Robertson," and sworn to, in proper form.

Defendant offers to read in evidence the deposition of W. A. McIvers. (Read.)

W. A. McIvers called as witness on behalf of defendant, who after having been duly sworn to testify to the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Fergusson:

Q. State your name, age, residence and occupation?

A. My name is W. A. McIvers, I am forty years of age, I live at Nogal, N. M. I am a mine superintendent.

Q. Are you acquainted with the Compromise mine at White Oaks?

A. Yes, sir.

Q. Do you know Benjamin H. Dye, one of the plaintiffs in this case?

A. Yes, sir.

197 Q. Where were you living in November, 1900?

A. At a mining camp called Schelerville, Lincoln County, N. M.

Q. How far from White Oaks?

A. About fifteen miles.

Q. Did you see Mr. Dye, the plaintiff, at any time during the month of November, 1900, and if so, where and how came he to be where you saw him?

A. Yes, sir; I saw him at Schelerville, N. M., on the 26th of November, 1900. He came there to examine some mining property that I had in charge.

Q. How long did he remain there?

A. Two days.

Q. Did you have any conversation with him during his stay at this camp of Schelerville relative to the Compromise mine, at White Oaks?

A. Yes, sir.

Q. Who was present at that conversation?

A. Mr. William Despain, George M. Hosmer, E. L. Chase and myself and Mr. Dye.

Q. Where was this conversation?

A. In one of the sleeping tents at the camp.

Q. Now give the conversation as nearly as you can remember it.

A. Relating to the Compromise mine at White Oaks?

Mr. CHILDERS: This question, and the answer to it, the plaintiff objects to, upon the ground that it was made to a third party, that it was not intended or shown to have been intended to influence the conduct of the defendants or any of them, and that the record was open to both parties equally and alike, and that it is irrelevant immaterial and incompetent, and tends in no way to raise an estoppel against the plaintiffs.

Same ruling.

Exception.

198 A. We were talking about the different mines in White Oaks and in our own camp, and the conversation came up about the Compromise mine, and I made a remark that I thought some day it would make a great mine; Mr. Dye also had the same opinion and at that time told me in the presence of these other parties that he had at one time owned a one-sixth interest in the mine, I mean a five-sixth interest, not a one-sixth interest, in the mine, and that he had let it go by paying a debt with it and that he thought at that time that it was well sold. And I mentioned to him about another man telling me that the mine was attached and sold and I also asked him if it was true that Colonel Heman had owned a one-sixth interest in the Compromise mine and had sold it to Tom Johns for one hundred dollars. Mr. Dye told me that he thought those were the facts.

Object and move to strike out the last two sentences in that answer for the additional reason absolutely irrelevant and immaterial and relating to other matters than those involved in this suit.

Objection sustained.

Motion sustained.

Defendant excepts.

Q. When you spoke about it having been sold under an attachment in reply to his suggestion or statement that he had paid a debt with his interest, what if anything did he say on that point?

Same objection to that question and answer as made to Robinson same kind of question.
Same ruling.
Exception.

A. All he said was he considered it well sold at the time on the showing that was in the mine, that he thought the property was well sold as nobody had ever been able to find the ore shute
199 on the property.

Q. What connection was there in his conversation between paying the debt that he owed with his interest in the mine and its being sold under an attachment, what did he refer to, if you know?

Same objection, irrelevant, immaterial and incompetent.
Same ruling.
Exception.

A. He didn't refer to it in particular, but I knew myself.
Q. State what you know about that?
A. When I first went and looked at the mine parties there told me that Taliaferro had a deed to that property.

Objected to as hearsay.
Objection sustained.
Defendant excepts.

Q. State whether or not you understood from this conversation at the time and place you have named that he referred to the debt for which the attachment suit was brought and the mine was sold as being the debt that was well paid with the mine.

Mr. CHILDERS: That is objected to upon the ground ir-elevant, immaterial and incompetent and upon the additional ground that it is calling for the supposition of the witness and his understanding.

A. That is what I supposed from his conversation, that is what I understood.

Objection sustained.
Defendant excepts.

Q. You stated above that he said that he thought at that time it was well sold. Do you mean at the time that it was sold?
200 Same objection; irrelevant, immaterial, incompetent.

A. I mean at the date the mine was sold.
Q. What was the state of the mine at the time of this conversation as to its value, compared with it at the time it was sold?

Objection sustained.
Defendant excepts.

A. The mine was in fair development and there was ore in the tunnel, also in the shaft, about forty feet deep at that time and a winze ten feet deep and the free gold showed in all three places, according to the way I examined the mine. I thought it was worth about fifty thousand dollars. When a mining man goes to look at

a mine he has to figure on what pay ore is in sight and not what is probable.

Object to that question and answer upon the same grounds made to the question referring to conversation in E. Robinson'- and McIvers' testimony.

Sustained.

Exception.

Q. State whether or not you have any interest in this property or in the result of this suit?

A. I have no interest in this property nor any other property in camp of White Oaks.

Cross-examination by Mr. CHILDERS, for plaintiffs:

Q. Of what mine are you at present superintendent?

A. Homestake, for the Iowa-New Mexico Mine and Milling Company. I am superintendent of Turkey Creek Gold Mine.

Q. Where are these mines located?

A. At the head of Turkey Creek, about a mile and a half south of Nogal Peak.

Q. How long have you known the Compromise mine?

201 & 202 A. About one year.

Q. Had you examined it when you say you had this conversation with Mr. Dye?

A. Yes, sir; about four months before.

Q. You say this conversation was in November what time in the month of November?

A. It was on the night of the 26th of November.

Q. Dye visited your camp and stopped there two days?

A. Yes, sir.

Q. What was the purpose of his visit to your camp?

A. I had him come there to examine our mines, to look at the surface showing.

Q. Did he ever go there more than once for that purpose?

A. Not to my knowledge.

Q. You never saw him more than that once?

A. I never saw him.

Q. What was Messrs. Despain, Hosmer and Chase, whose names you have mentioned, doing there at that time?

A. They were sitting around in the tent on benches and cots.

Q. Were they working in that camp?

A. Yes, sir.

Q. For whom?

A. For the company that I represent.

Q. Did they have any interest in the Compromise mine at that time?

A. No, sir; they never had seen the mine.

Q. Do they claim to have any interest in it now?

A. No, sir.

Q. Who introduced the subject of this conversation relating to the Compromise mine?

A. I introduced the conversation in regard to the Compromise.

Q. Did you ask Dye about it, about the Compromise?

203 A. Yes, sir; as to the condition of the mine and the value of it.

Q. And as to whether he claimed any interest in it?

A. I did not ask him if he had any interest in it then, he had told me before this of disposing of his interest.

Q. What was your object in asking about the Compromise?

A. My object was to hit his information.

Q. Why did you want his information, was it mere curiosity or for the purpose of acquiring any interest in the claim?

A. My reason for asking him was that I had a commission from parties in the east to buy a free milling gold property.

Q. Who are those parties?

A. Barr and Shannon, of Waterloo, Iowa.

Q. Did you inform Mr. Dye of this fact?

A. No, sir.

Q. Did they ever acquire any interest in it or you for them? These eastern people?

A. No, sir; they never have.

Q. Who was in possession of the Compromise mine at that time, 26th of November, 1900?

A. Heiniman and Crary had possession at that time.

Q. Two of the defendants in this suit?

A. Yes, sir.

Q. How long had they been in possession of it, if you know?

A. I couldn't say.

Q. To your knowledge?

A. Three months.

Q. Were they engaged in working it and developing it at that time?

A. Yes, sir.

Q. I will ask you to state the whole conversation that took place at that time between you and Dye or between Dye and any

204 of the other persons present, which you heard, in your own language, as nearly as you can recall it?

Objected to.

Objection overruled for the present.

Exception.

A. We were all sitting in the camp around the fire and the conversation started in regard to the Old Abe mine and the Compromise mine as to where the gold came from and in regard to the formation. Mr. Dye's theory that the gold was produced there by volcanic action and that where the Compromise mine, South Homestake and other mines in that district was the mouth of an old crater. Mr. Dye directed his conversation to me and I made the remark that it was a peculiar thing that the people who had mined this property had run over the top of the lead or ore shute and had not discovered it. They had also run a trench about a hundred and fifty feet and that at one point in the trench they were within fifteen inches of the ore

and had not discovered it. Mr. Dye said that the people who had done the work had done it in a very careless manner or did not know what they were looking for. I asked Mr. Dye why it was that they went up so high to start their tunnel. He said that he thought it was because it was an easy place to do the work. That is about all I guess. The conversation drifted off to hunting about then.

Q. State all that was said there in conversation about his having owned an interest in the mine and that he had let it go by paying a debt with it?

A. Yes, sir; and he said at the time that he considered it pretty well sold.

Q. I am asking you for all that was said on that subject, as near as you can recall it, the conversation?

205 Same objection; object to all of these questions and answers down to "Q. Did he say anything about ever having examined the records to see whether the sale was valid or anything about that?"

Objection overruled.

Exception.

A. He told me that he thought the property was well sold at that time, that there was no ore that showed up at that time.

Q. How much did he say it sold for, his interest in it?

A. I couldn't say whether it was two hundred and fifteen or two hundred and twenty dollars, somewhere in that neighborhood.

Q. Did he say that it had been voluntarily sold by him or sold under proceedings in attachment against him?

A. He didn't tell me it was sold under any attachment.

Q. How do you know that it had been sold under attachment?

A. Jones Taliaferro told me.

Q. How did you understand that it was to this sale that Dye referred?

A. Just from the—he made a remark that there was a sheriff's deed given to Jones Taliaferro.

Q. State exactly what he did say about the sheriff's deed?

A. I asked about the title to the property and he said he thought that there was nothing against the property.

Q. Did he say anything about ever having examined the records to see whether the sale was valid or anything of that kind?

A. No.

Q. You didn't state on the direct examination that the attachment suit or the sheriff's deed was mentioned, why didn't you mention it on the direct examination?

206 A. I am telling you the way the conversation comes back to me.

Q. Then your recollection is refreshed by cross-examination?

A. Somewhat.

Q. You stated that the mine was in fair development at that time and that you thought it was worth about fifty thousand dollars, do you mean that that was the estimate you put on its value on the 26th of November, 1900?

A. Yes, sir.
Q. When had the work been done which gave it this value?
A. Mr. Heiniman and Crary had done the work.
Q. You state that you examined; when did you examine it with reference to this date?
A. About the first week in November.
Q. That was the time you made the estimate?
A. Yes sir.
Q. How long have you lived in New Mexico?
A. A little over a year.
Q. Don't you know that it is a fact that Dye only staid twenty-four hours on that occasion at your camp?
A. It was longer than twenty-four hours.
Q. You are not very friendly to Dye are you?
A. I have no reason to be any other way.
Q. Do you remember coming to White Oaks a little after this suit was brought and hearing it talked of at White Oaks and some talk about a mob or something of the kind in connection with this suit?
A. No, sir.
Q. Isn't it a fact that you did come up to White Oaks sometime in February and upon your return to your camp, state in substance that Dye was trying to steal the mine and that he would be killed sure.
A. I never made any such a remark there or any other place.
207 Q. Where did you live before you came to New Mexico?
A. In Iowa.
Q. Were you ever in the mining business before you came to New Mexico?
A. Yes, sir.
Q. Where?
A. Montana and Idaho, Washington, British Columbia and Wisconsin.
Q. You have been in the mining business pretty much all your life?
A. Considerable time, more or less since 1884.

That is all.
(Signed) W. A. M'IVERS.

The defendant offers to read in evidence the deposition of W. M. Despain.

Deposition of W. M. Despain.

Called as the next witness by defendants, who, after having been duly sworn to testify to the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. FERGUSSON:

Q. What is your name, age, residence and occupation?

A. My name is W. M. Despain, I am sixty-three years of age, I live on Turkey Creek, Lincoln County, New Mexico, I am a carpenter, and am now framing timbers at the Turkey Creek Gold mines.

Q. By whom are you employed?

A. By the Iowa and New Mexico Mining and Milling Company.

Q. Who is the superintendent of that company?

A. Of the mine at Turkey Creek, W. A. McIvers.

Q. How long have you lived in Lincoln County?

A. A year last May.

Q. Do you know a man named Dye, one of the plaintiffs to this suit?

A. I have met him, I can't say that I am intimately personally acquainted with him.

208 Q. State whether or not you saw him sometime last November in Schelerville, Lincoln County?

A. Yes, sir; I did.

Q. What time in November was it?

A. If my memory serves me right it was the 25th.

Q. State whether you were present or not at a conversation between Mr. Dye, the plaintiff, and Mr. W. A. McIvers at Schelerville about that time? Relative to the Compromise mine at White Oaks?

Same objection; same as to the questions and answers relative to conversations in the deposition of this witness as made to Robinson's.

Overruled.

Exception.

A. Yes, sir; I heard the conversation, or a part of it at least.

Q. Who were present at that conversation?

A. Mr. E. L. Chase, George M. Hosmer, Mr. McIvers and myself and Mr. Dye.

Q. Just state in your own way to the best of your recollections the conversation which you heard or the part which you heard of it, between Mr. Dye and Mr. McIvers?

Same objection.

Same ruling.

Exception.

A. Mr. McIvers asked Mr. Dye what he thought of the Compromise mine—he asked him if it wasn't a good proposition, something to that effect. Mr. Dye said he thought it was, that he once owned an interest in it some way or other, but let it go; I don't know

exactly the words said, but that is the way I have it in my mind—let it lapse. I don't remember the exact words, but there was something to the effect that he had let it go for a debt and thought
209 he did very well to pay the debt with it. I was busy at work and did not pay as much attention as I might have done othe-wise. I believe that is all I remember that I heard of it.

Q. What, if anything, did you hear at that time and place and in that conversation relative to any attachment suit wit' connection of that mine?

Same objection.
Same ruling.
Exception.

A. There was something said about that suit, but I don't remember what it was; something about an attachment suit and a sheriff's deed; I couldn't say what that was, but there was something said about it.

Q. If you can remember anything further about the conversation so far as it related to the Compromise mine at White Oaks you may state it.

A. I think that is all that I remember of that conversation.

The defendant offers to read in evidence the testimony of W. R. Fuston.

W. R. FUSTON, called as the next witness by defendants, who, after having been duly sworn to testify to the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination by Mr. FERGUSSON:

—. What is your name, age, residence and occupation?

A. My name is W. R. Fuston, I am thirty-five years of age, I live at White Oaks, New Mexico, I am a miner.

Q. How long has you lived in White Oaks?

A. I came to White Oaks the 11th day of April a year ago.
210 Q. For what companies or men have you worked while in White Oaks?

A. First for the Boston Boy, next for the Compromise, only those two—yes, since I have worked for the Old Abe.

Q. Are you working for any one now?

A. No, sir.

Q. When and for whom did you first go to work on the Compromise?

A. I commenced on the Compromise the 18th day of August, 1900, for Mr. Heiniman and Crary.

Q. How long did you continue to work ther-?

A. Five or six months. I don't remember just how long, I worked until they shut down.

Q. What caused the shut down, if you know?

A. The cause of the shut down was that Mr. Dye brought suit against Mr. Heiniman and Crary.

Q. State, do you know B. H. Dye, one of the plaintiffs in this suit?

A. Yes, sir.

Q. What was he engaged in after you went to work on the Compromise during the following months of that year, if you remember?

A. Engaged in mining.

Q. On what claim?

A. He was working on the Lady Godiva property.

Q. How far is the Compromise claim, where you were working, from the Lady Godiva, where Mr. Dye was working during that time?

A. I should judge it was near four or five hundred yards.

Q. Was the place you were working in view of the place where Dye was working or the shaft house of the Godiva?

A. Yes, sir.

Q. Was any strike of any value made on the Compromise while you were working there, and if so, when was it made and who made the first discovery of valuable ore?

211 Objected to as irrelevant, immaterial and incompetent; object- to the whole deposition for the same reason as incompetent, irrelevant and immaterial.

Objection overruled.

Exception.

A. There was a rich strike made on the 22d day of August, 1900, by myself.

Q. State when, as near as you can, you first saw Mr. Dye on the Compromise after that strike was made, if you ever saw him there?

A. Mr. Dye came to the place where I was working as well as I remember on the 25th of August, 1900.

Q. What did he do while he was there? At that time?

A. I was working back in the tunnel; he came back in where I was working and asked me to show him the rich streak which I had found in the tunnel. I took my candle and went through and showed him the streak where I had found the gold.

Q. How often from that time on did Mr. Dye come on the mine? That you saw him there?

A. I couldn't just say, he was there frequently after that.

Q. Did you have any conversation with him during any of these visits?

A. Two different times he talked with me about the property.

Q. When was the first time he talked to you about it?

A. The first time I think was on the 25th of August.

Q. What did he do when you showed him the rich streak with reference to the ore in it?

A. He asked me to help him to get the course in which the streak run across the tunnel. I did so.

Q. Did he take any of the ore?

A. He took two or three small specimens.

Q. What did he do with the specimens, at that time I mean.

212 A. He walked away with them in his hand.

Q. Did he examine them when he got out to the light?

A. He was out at the light at the mouth of the tunnel when he took the specimens, I washing some gold out and he asked me if he could take a specimen or two, he would like to assay it to see what it would run, for his own satisfaction, he said.

Q. For what purpose did he want to trace the course of the strike which was made, the vein or streak?

A. He told me the reason was that he had a property adjoining on the north, the "Little Nell," the reason he wanted to have the course of the vein was to see where it would strike his property, that was all.

Q. Did you have any conversation with him at that time, about the property, the Compromise mine?

A. Yes, sir; some little.

Q. State that conversation? Giving as nearly as you can remember what was said by each of you?

A. He said his object was to find if possible where this vein crossed his line on his property, the line between the Compromise and the "Little Nell," as he wanted to set a man to work prospecting on the "Little Nell" property.

A. At the time there was an old man there who was working on the "Little Nell" for Mr. Dye. He wanted to try to catch this vein that I found for he says it looks very fine.

Q. This conversation that you are detailing now is what took place on the 25th on his first visit?

A. Yes, sir.

Q. Go on?

Same objection that was made to same conversations and questions in the testimony of the other witness, Robinson.

213 Same ruling.
Exception.

A. He said I once owned an interest in the Compromise, but I lost my title to it through, there was a debt he said hanging over the property. Mr. Taliaferro held the account against Mr. Dye. I mean Dye said Taliaferro held an account against him, Dye, and he attached the property, and the property was sold at sheriff's sale for the account, to satisfy the claim. He said I am glad that Mr. Heiniman and Crary have made a good strike on this property. While I hold no interest whatever in the property I would like to see them do well, as it will enhance the value of my property adjoining. He said it looks very fine, I am proud to see it. And there was several questions passed after that—just the particulars, the details, I can't remember just now. To me it was of no particular interest at that time.

Q. You said you had two conversations about the property with Mr. Dye, when was the next one?

Same objection.
Same ruling.
Exception.

A. Yes, sir; it was inside of a week after the first conversation

took place as near as I can remember; it was about the same conversation as took place the first time; on the same strain.

Q. State whether or not you ever mentioned to Heiniman and Crary or either of them the purport of the conversations you had with Mr. Dye afterwards?

Same objection; irrelevant, immaterial and incompetent.
Same ruling.
Exception.

214 —. Mr. Crary was away at the time; when he came home I told him that Mr. Dye had been there and examined the property, and that he took a few specimens with him and he said he wanted to have them assayed for his own satisfaction, and I went on to explain to Mr. Crary about the conversation that took place between me and Mr. Dye. Just all the particulars I cannot recall to mind, for right at that time there was many people coming for me to show them through the property. I was very busy and had to show a good many people through the property at that time.

Q. Did you ever, while you were working on the Compromise, see Mr. Dye and Heiniman and Crary or either of them on the property together and how often?

A. Yes, sir; several different times, he came over there and was talking with Mr. Heiniman or Crary. They done as I had done, showed him through the property.

Cross-examination by Mr. CHILDERS:

Q. Where did you come from to White Oaks?
A. I came from Elizabethtown, N. M.
Q. How long did you live at Elizabethtown?
A. Something near to two years and a half.
—. Where did you come from to Elizabethtown?
A. Raton, New Mexico.
Q. How long did you live there?
A. I lived in Raton about two years.
Q. What business were you engaged in at Raton?
A. I was working with Mr. Tom Boyd in secondhand furniture store, part of the time, and part of the time I was making my home in Raton I worked about two months on a dairy, on a milk
215 wagon, was in and out of town every day. And a few days at the carpenter's trade.
Q. What busines- were you engaged in at Elizabethtown?
A. I first went there I worked at the carpenter's trade, after that I went to work on the Black Copper mine on the Red river district, about eight miles from Elizabethtown.
Q. Were you mining all the time after that at Elizabethtown and Red river?
A. When I quit the mines there I came over to town and staid two or three months during the winter and didn't do much of anything during that time? I came from there down to Capitan and over to White Oaks.

Q. You have never been engaged in the saloon and gambling business?

A. No, sir; never in my life. Five dollars would cover all my gambling in my whole life.

Q. You worked on the Boston Boy for Mr. Heiniman and Crary how long?

A. I commenced working on the Boston Boy for Mr. Heiniman and Crary on the 4th day of May, 1900, and I worked there until I commenced working on the Compromise, that was on the 18th of August, 1900. I went to work the very next day after I quit the Boston Boy on the Compromise. I don't know who I was working for on the Boston Boy. Heiniman and Crary are interested in it.

Q. The Compromise didn't shut down until this suit was brought.

A. No, sir.

Q. If the service was made on the defendants on the 17th day of January last when did the mine shut down?

A. Just the day, I think it was the 21st, I ain't positive about that.

Q. The first rich strike was made on the Compromise on
216 the 22d of August, 1900, by you?

A. Yes, sir.

Q. Where was this strike?

A. It was in a tunnel.

Q. When did he come in there to see this place?

A. It was on the 25th day of August, I think it was.

Q. How much of a strike had you uncovered at that time?

A. It was pretty rich, the vein was thick as my hand, a streak of manganese running across the face of the tunnel. It runs from the bottom of the tunnel to the top.

Q. Was he ever in the mine after that, or merely on the mine?

A. Yes, sir; several times.

Q. How many times was he in it?

A. I couldn't tell you how many times he was in the mine, I talked with him about the matter twice, that I remember.

Q. On the 25th of August and what other date?

A. Something near a week afterwards I think it was.

Q. On this 25th of August he told you that he wanted to trace the course of the strike or vein for the purpose of seeing where it would strike the Little Nell?

A. Yes, sir.

Q. Does the Little Nell adjoin the Compromise?

A. Yes, sir.

Q. To whom does the Little Nell belong?

A. I couldn't tell, Mr. Dye I think claimed it or the control of it anyway. If he doesn't own it it belongs to some one he is representing. I don't know just how that matter is.

Q. Does it not belong to Mr. Harrison, who lives in St. Louis, and is not Mr. Dye his superintendent?

A. If I rightly understand Mr. Dye is his superintendent, but I couldn't say whether Mr. Harrison owns the property or not.

Q. He told you that he had lost the Compromise on ac-
217 count of an indebtedness he owed Mr. Taliaferro?

A. Yes, sir.

Q. Now go on and give the exact language that was used by Mr. Dye on this occasion as near as you can recall it, about the debt and his interest in the claim, etc.?

A. He said he once owned an interest in the claim and that Mr. Taliaferro attached the property and it was sold at sheriff's sale to satisfy the debt.

Q. That was all he said about the sheriff's sale and satisfaction of the debt?

A. That is all I remember about that part of it.

Q. What else did he say on that occasion?

A. He said that he was glad that they had made a strike on the property while he had at that time no interest in the property, but it would enhance the value of his property adjoining.

Q. You say several other questions passed, the exact particulars of which you do not now remember?

A. Yes, sir; in the conversations there were other things passed that I don't remember; my mind was on my work.

Q. The next conversation took place about the middle of the week following?

A. It was about a week afterwards.

Q. You said it was about the same thing?

A. Virtually about the same, on the same subject and strong.

Q. Who was present when these conversations took place?

A. That would be a kind of a hard question; there was somebody there off and on about all the time.

Q. Neither Heiniman or Crary were there at the date of these two conversations, were they?

A. No, sir.

Q. Mr. Dye didn't tell you to repeat the conversation to
218 Mr. Heiniman or Crary for him, did he?

A. No, sir.

Q. You were in no way his agent for the purpose of repeating to Heiniman and Crary?

A. No, sir.

Q. You say you did repeat it to Mr. Crary afterwards?

A. Yes, sir; something near what he told me. I talked with him about the matter.

Q. How soon afterwards?

A. As soon as he came home. He was away at the time a day or two anyway, often he came home. He was talking to me about the property, about the strike, how I struck it and how it showed up.

Q. State what you said to Crary about these two conversations with Dye?

A. As near as I can remember it was about the same conversation that Mr. Dye and I had about the matter, I told him what I showed Mr. Dye in the tunnel concerning the streak of ore and vein there.

Q. What did you say to him about the sheriff's sale and the attachment and the debt to Taliaferro?

A. Something near the same conversation that Mr. Dye and I had, there was quite an excitement at the time over the property and Mr. Crary asked me questions who had been there, who I showed the

streak to and all about it, questions that would naturally arise concerning the property, the ore and so on.

Q. Did he express any satisfaction over what Dye had said? About the sheriff's deed and the attachment?

A. No, sir; he did not.

Q. What I want you to do is to repeat as near as you can what you told Mr. Crary about the attachment and the sheriff's deed?

A. In substance just the same as I talked with Mr. Dye and he to me concerning the matter, of course in two conversations,
219 couldn't repeat the same words verbatim, but as near as I can remember just what had passed between Mr. Dye and myself.

Q. You can't give the substance any more nearly than that?

A. As I told you before what passed before, that was all there was to it.

Q. How many times did you see Mr. Heiniman and Crary show Dye through the property?

A. I couldn't say just how many times, but several times, either one or both of them were talking with him and showing him the property.

Q. About when?

A. At different times along after that, for four or five or six months, up to the time the property was closed down he was there every once and awhile.

Q. Mr. Dye and you — very well acquainted with each other?

A. No, sir.

Q. Mr. Dye appears to be generally friendly with everybody he meets, doesn't he?

A. I think so, he always was to me.

Q. Takes a great interest in all that is done on the development of mines in the camp, doesn't he?

A. I couldn't say whether he does on all mines or not in the camp, his business was never mine and I didn't know very much about his claim. He seems to be an active man in mining interests in general.

Q. He is a mine expert, isn't he?

A. That I couldn't tell you, Mr. Childers.

Q. Have you any interest in the Compromise mine?

A. No, sir.

Q. Isn't there any agreement between you an- Heiniman and Crary that whenever the property is disposed of you are to receive something for it?

220 A. Not the least in the world. I would be glad to know that there was.

Q. Was there ever such agreement?

A. Never in the world.

Q. You have no interest whatever in the property or the result of this suit any more than ordinary interest?

A. That is all, except I hope to get work if they start working, that is all.

That is all.

(Signed) W. R. FUSTON.

Court in recess until 2 o'clock.

Defendant offers to read in evidence the testimony of Mark Thomas.

MARK THOMAS, called for the defense, having been duly sworn, testified in open court as follows:

Direct examination by Mr. FERGUSSON:

Q. What is your name?
A. Mark Thomas.
Q. Where do you live?
A. Albuquerque.
Q. What is your business?
A. I am a prospector.
Q. Have you ever been in White Oaks, New Mexico?
A. Yes, sir.
Q. Do you know Mr. B. H. Dye, one of the plaintiffs in this case?
A. Yes, sir.
Q. Did you ever see him in White Oaks?
A. Yes, sir.
Q. Do you know the Compromise claim?
A. I do.
Q. State whether you ever had any conversation with Mr. B. H. Dye concerning the Compromise claim?
A. I did.
Q. When?
A. It was on or about the last of August or the first of September, in 1900.

221 Q. Where?
A. It was on the Little Nell ground.

Q. Where is that Little Nell ground, with reference to the Compromise?
A. It lies to the east—to the east and north of the Compromise.
Q. Does it adjoin it, or is it far away from it?
A. Adjoins it.
Q. What was your business there at that time?
A. Prospecting.
Q. State how the conversation happened to come up, and then what it was, as near as you can remember?
A. When me and Mr. Dye was talking Mr. Dye said, I owned——

Same objection relative to conversation on the part of Dye relative to ownership or loss of the Compromise mine; irrelevant, immaterial and incompetent.
Same ruling.
Exception.

Q. Go on and tell the conversation?
A. Mr. Dye told me that he lost the Compromise property through failing to do his work; that after it became a good mine he wished he had it yet. That was his words to me.
Q. Can you remember anything further of the conversation bearing on that subject?
A. No.

Cross-examination by Mr. CHILDERS:

—. You say that was the only conversation you ever had with him about it?

A. No, sir. I beg your pardon, I didn't say that.

Q. Well, when did you have any other conversation with him?

A. We had conversations many times there about it.

Q. -ut that wasn't about the loosing of the claim?

A. He told me that he was back east and he did not get back in time to do his work.

222 Objected to; same reason.

Same ruling.

Exception.

Q. Well, now, this conversation that you have given, was that part of the same conversation, when he was back east?

A. It is word for word, about as near as I can remember.

Q. Is that a part of the same conversation which you have given here in response to questions from the counsel on the other side?

A. Yes, sir; that is the same conversation that passed between Mr. Dye and me.

Re-direct examination by Mr. FERGUSSON:

Q. Was this conversation before or after the rich strike had been made?

A. This was after the big strike had been made.

Defendant offers to read in evidence the testimony of Frank Alexander.

FRANK ALEXANDER, called for the defense, having been duly sworn, testified, in open court, as follows:

Direct examination by Mr. FERGUSSON:

Q. What is your name?

A. Frank Alexander.

Q. Where do you live?

A. I live at Angus, on the Bonito river, Lincoln County.

Q. What is your business?

A. Blacksmith.

Q. Where were you living in the years 1888, 1889 and 1890—I mean 1898, 1899 and 1900?

A. White Oaks, New Mexico.

Q. Do you know Mr. B. H. Dye?

A. Yes, sir.

Q. You gave a deposition in this case once before? You
223 are the same man who did that, are you?

A. Yes, sir.

Q. Did you have any conversation with Mr. Dye relative to the Compromise mining claim?

A. I have had, yes.

Q. State whether or not you have had such conversation some time in October, 1900?

A. I don't remember as I had any conversation with him just in October.

Q. Were you present at any conversation between him—about that time—and Mr. Heiniman and Mr. Crary?

A. I was present when this conversation took place between Mr. Heiniman, Mr. Crary and Mr. B. H. Dye.

Q. Where was that conversation?

A. It was at or near the shaft.

Q. What shaft?

A. Of the Compromise mine.

Q. State what you heard of that conversation?

Objected to as immaterial, irrelevant and incompetent, and tends to establish no estoppel.

Same ruling.

Exception.

All the conversations objected to upon the grounds last above stated.

A. There was very little of that conversation that I could repeat, from the fact that I was very busy at work, and was taking no part in the conversation myself at all.

Q. Well, what was the subject of the conversation?

A. As I understood it it was in regard to the mine, the conditions, and to, as I understand it, also as to the boundaries; in fact in general in regard to the condition of the mines and the property at that time.

Q. Well, what else that you can remember?

224 Q. Well, go ahead and tell anything that shows the subject of the conversation?

A. This part of it was plain to me. I was waiting on the men in the shaft who were timbering, and had at one time quite a heavy timber to handle that I could not handle very well myself, and Mr. Heiniman left the crowd and came to help me, and whilst helping me with that timber continued his talk, which I recall.

Q. State what that was?

A. He says, Professor, I am glad that we called or asked you in regard to this, for I believe that you know more about this than anyone else.

Q. Well, what was it; what other words did you hear in the conversation?

A. That is all; all that I can call to mind now of the distinct words.

Q. What, if anything, was said about the title to the mine?

—. ——.

Q. Now, Mr. Alexander, answer again the question?

A. I don't remember exactly any particular thing, more then, as I understood it, in regard to the general conditions of the mine at that time, just as I understood it.

Q. Do you remember anything that Mr. Dye said in reply to anything that was said to him?

A. No, sir. I didn't hear his reply. If I did I paid no attention to it, for I was quite busy.

Q. About what time was this conversation, as near as you remember?

A. It was sometime in October, but I couldn't say just what time. Probably after the middle or about.

Q. What conversation, if any, did you have with Mr. Dye yourself while you were at work upon the mine or about that time relative to the mine?

Same objection to this question and conversation illicited,
225 if any, and the additional objection that it was not Heiniman and Crary and does not tend to create any estoppel.

Same ruling.

Exception.

A. I have had several conversations with the professor in regard to the mine.

Q. What did he say in such conversations with reference to his relations to the mine, in those conversations?

A. Well, in each and all of those he always lead me to believe.

Objected to upon the same grounds as above stated and also he cannot state what he was lead to believe.

Same ruling.

A. Well, he has often said that he wished the mine well. As he had once owned. Yet he held no ill-feeling or anything towards these people, and wished them well; wished them success.

Q. What with reference to his ownership in it, if anything?

A. I don't know as he ever spoke about holding the ownership in it then.

Q. Then or any time?

A. He had previous to that, before that, that he had owned it.

Same objection.

Same ruling.

Exception.

Q. State whether subsequent to these dates referred to you had any further conversations with him down in the city of White Oaks, and if so when and where?

Object to the question and answer because the answer states it was after suit was brought and tends to establish no estoppel.

Same ruling.

Exception.

226 A. Later than that, in fact after the notice of this suit had been brought, I had one more conversation with the professor, in which this was spoken of.

Q. How did the conversation come up and where did it take place?

A. It took place in professor's office, I think in April, 1901.

Q. Tell how it came about?

A. Well, we were talking; professor was showing me some plans that he had for work, and offered me a position.

Q. Just go ahead and tell the whole conversation as well as you can remember?

A. Well, just as I said, we were talking about or examining these plans for these works that the professor was talking about, in which he offered me a position, and whilst at the end of this, then he spoke about this property again, that he had unfortunately let go by reason of being cramped for money, but that he hoped to regain it.

Object to that answer and ask the court to pass upon it, it does not purpose, it cannot be competent to establish estoppel and is not admissible for any purpose.

Objection sustained.

Defendant excepts.

Q. That was after the suit was brought you say?

A. Yes sir.

Same objection to all the other questions and conversations and because it is wholly immaterial and irrelevant.

Objection sustained to all the rest of that testimony.

Exception.

Q. Go ahead and tell all the conversation, in your own words, just as it came up—everything that occurred between you?

A. I don't just recall it word for word, but this was the
227 substance of the conversation; he also spoke of having me subpœnaed and taken to trial as his witness.

Q. Well, tell what you said as to that; tell the whole conversation?

A. I told him that I was already or would be subpœnaed, so I understood, by the other parties. He asked me what good I could do them, and I told him; I don't know as I could do them any good or any harm; I don't know. After this we shortly broke up, or the conversation did, and that was the substance of the conversation.

Q. Is that all you can remember of it?

A. Yes, sir; I believe it is all that I can recall just now.

Q. Have you had any conversation at any other time that you can recall, except what you testified to?

A. No.

Witness excused.

Defendant offers to read in evidence the deposition of E. Heiniman.

E. HEINIMAN, called as the next witness by defendants, who after having been duly sworn to tell the truth, the whole truth and nothing but the truth, testifies as follows:

Q. What is your name, age, residence, occupation?

A. My name is E. Heiniman, I am thirty-six years of age, I reside at White Oaks, New Mexico, I am in the mining business.

Q. How long have you resided in White Oaks?

A. Two years last March.

Q. Are you the Eugene Heiniman named as one of the defendants in this suit?

A. Yes, sir; I am.

Q. Are you one of the owners of the Compromise mining claim?

A. Yes, sir; I am.

Q. When did you first assume any connection with the
228 Compromise mining claim?

A. It is a year the fifth of this month, the fifth of June, 1900.

Q. What was that connection assumed at that time?

A. I—we took a bond and lease on the property from Mr. Taliaferro for six months.

Q. What do you mean by we?

A. Mr. H. C. Crary and I.

Q. H. C. Crary, the defendant?

A. Yes, sir.

Q. Were you put in possession of the property at that time under that bond and lease by Mr. Taliaferro?

A. Yes, sir; we were.

Q. What did you proceed to do?

A. We first proceeded to do some work in a cross-cut, which was fifty feet west of the main tunnel or the old tunnel. We did a very very little work there, only one day. And there we discovered pay ore in place. While Mr. Crary was doing that work I myself drilled three holes in the old tunnel, it is fifty east of the discovery. That was at the floor of the mouth of the old tunnel and after wheeling—after shooting I wheeled the dirt out and repeated the same thing the second morning, and removed about three tons of ore.

Q. When was this done?

A. Well, we took the bond and lease on the 5th of June and we made that discovery about, I should judge that was about the 15th of June, but, mind you, what was considered the—there was nothing said about this—what was really the discovery was made in August. It wasn't considered a discovery, except by ourselves, until after.

Q. Have you that bond and lease?

A. I think not.

Q. Do you know who has it?

A. I think it is in Mr. Lund's safe. It is recorded.

Q. What is the amount you are ultimately to pay, that
229 was named in that bond and lease, if you took the property?

A. $1,500.

Q. Did you work on the Compromise continuously? During the bond and lease?

A. We did.

Q. About how much was spent in your operations in development work, before you finally paid for the property, about?

A. Between four and five thousand dollars.

Q. When did you take up the deed and lease, or buy and pay for the property and take a deed, if you did get one.

A. On the first day of November, 1900.

Q. Did you pay the full face of the bond?
A. I did.
Q. And received the deed on that day?
A. I did.
Q. And the deed was recorded?
A. It was; I have the original.
Q. What was Mr. Dye engaged in, if you know, from the 5th of June, 1900, until you took up the bond and lease of this property.

Objected to as irrelevant and im-aterial.
Same ruling.
Exception.

A. I don't think that the Lady Godiva was in operation, that he had charge of, when I first took the bond and lease; if it was not in operation at that time, shortly afterwards it was, within a very short time.
Q. After he began operations, on the Lady Godiva, did he work it continuously until you took up your bond and lease?
A. They closed down, before I took up the bond and lease.
Q. About how long before?
A. Not more than thirty days.
Q. When was the big strike made on the Compromise? About?

230 Objected to; irrelevant and immaterial.
Overruled.
Exception.

A. It was either the latter part of August or first of September; it was right along at that time.
Q. While you were working on the Compromise and Mr. Dye was working on the Lady Godiva, did you and he return to White Oaks at night, and return to your work next day regularly?
A. Yes, sir; we did.
Q. State whether you ever went down at night and returned in the morning in company with each other during that time?
A. Yes; frequently we did.
Q. Did you ride together in the same buggy?
A. Yes, sir; we did.
Q. Did you do that frequently?
A. Yes, sir; we did.
Q. Did you do so after the big strike was made?
A. Yes, sir; we did more so than before.
Q. State whether or not you ever informed Mr. Dye on any of these trips, or other conversations, of your operations, on the Compromise claim?
A. I did. He visited the claim every day nearly.
Q. State whether or not, he knew, if you can, during that time that you were developing that claim under the bond and lease?

Objected to as irrelevant, immaterial and incompetent.
Same ruling.
Exception.

A. Certainly, he knew it well—as well as I did.

Q. State whether or not you had a conversation with Mr. Dye a few days prior to November 1st on the Compromise claim relative to your bond and lease, and taking up of the same, and if so,
231 state in your own way, and as accurately as you can remember, giving the substance and effect when you can't remember the exact words of that conversation, if there was one?

Mr. Childers objects upon the ground that it is not shown that Dye knew that his statements were to be relied upon, and tends in no manner to raise estoppel, and because the records, including the attachment record, and the sale of this mine, were equally open to the investigation of both parties as to the state of the title.

Same ruling.

Exception.

A. Yes, there was on or about the 23d of October. Mr. Dye visited the mine, and while there in the presence of Mr. Alexander, Mr. Crary, I told him that I was about to make the payment for the property in full, and I asked him if he knew of any conflicting claim or any other claims on the Compromise. He immediately answered there was. The Scranton claim on the west took off about a hundred feet, and he said as to other claims there would be nobody but myself. And he says I have allowed all my time to lapse and I have no claim whatever. With that he wished me success, and hoped that it would prove to be a good mine. He says if it does, it is bound to benefit me, because I own an interest in the Little Nell claim just north of you, which is only 155 feet north of the Compromise shaft.

Q. What reply, if any, did you make to Dye's statement as to the title which you have just mentioned?

Objected to for the same reason.

Same ruling.

Exception.

A. As I expressed my gratification, and told him that I was glad to see that we were all working in harmony in the camp, etc.
232 Well, he says, I wish you the best. I hope you make a million out of it.

Q. State whether or not if Dye had told you not to make that payment, as he was going to try to recover the mine, whether or not you would have made the payment?

Objected to upon the same grounds as already stated to the last preceding question; also the additional ground that he cannot make evidence for himself by declarations after payment was made or on the trial of the case; that is a question for the jury or court.

Objection will be overruled for the time being.

Exception.

A. No, I would not.

Q. You stated earlier in your examination that Dye knew while you were working the Compromise, prior to the first of November,

that you were working it under a bond and lease from Jones Taliaferro; how do you know that he knew that?

A. Why, by frequent conversation; he knew as well as I did.

Q. What was the condition of the Compromise mine, as to apparent value, or pay ore in sight, when you went into possession of it in June under the bond and lease you have mentioned, and what was the probable cash value of it at that time?

Objected to as irrelevant and immaterial and incompetent.
By the COURT: I cannot see the relevancy and I will exclude it.
Defendant excepts.

A. There wasn't the first pound of pay ore in sight at that time. Of course, after we once prospect a claim and give it up we consider its value less than when we first prospect it. Taliaferro told me that he would have been glad to have taken $500 cash.

233 Answer excluded.
Defendant excepts.

Q. State whether or not you think, before you made any discoveries whatever, that that would have been a fair price for the mine in cash?

Objected to.
Excluded.
Defendant excepts.

A. It was more than any experienced mining man would have paid for it.

Q. How long have you been engaged in mining?

A. Since 1889.

Q. Have you examined many prospects and mines, and what is the extent of your experience in that line; state briefly?

A. I have examined many properties for myself and others, and make a business of it.

Q. What was the Compromise mine worth, in your opinion, after the strike and after all your development was done, at the time this suit was brought?

Objected to as irrelevant, immaterial and incompetent.
Overruled.
Plaintiff excepts.

A. The property is well—was well worth at the time the suit was brought, $100,000.

Q. What gave it this increased value in about seven months?

Same objection.
Same ruling.
Exception.

A. The development work on our discovery of the ore.

Q. When did you first learn that Mr. Dye intended to assert a claim against that mine?

A. Not until I was served with papers by the sheriff in this case.

234 Q. State whether or not Mr. Dye visited the Compromise mine while you were working it, after November 1st, 1900, when you took up your bond and option, and received your deed?

Objected to as irrelevant, immaterial and incompetent.
Same ruling.
Exception.

A. He visited with the same frequency that he had, up to the day before I was served with the papers. He was on the ground the day before I was served.

Q. During the time that you were working the Compromise prior to your final payment on November 1st, 1900, while Mr. Dye was also working the Lady Godiva and frequently visited you- work as you have testified, state whether or not Mr. Dye at any time intimated anything as to his having a claim against the mine, or his intention to assert any claim, or gave you any warning whatever of the suit that has since been brought?

Objected to as irrelevant, incompetent and immaterial and in no manner tends to establish an estoppel.
Overruled.
Exception.

A. None whatever. On the contrary, he always wished me the best.

Q. What did he do or say, if anything, relative to encouraging you to go ahead with your enterprise on that claim?

A. He always expressed himself, while visiting the mine, that it was one of the brightest prospects in the camp, and that he was glad I was one of the owners.

Objected to.
Overruled.

235 Exception.

Q. What, if anything, was ever done by you and Mr. Dye prior to November 1st, 1900, in the way of tracing the vein, that you had discovered onto the Little Nell?

Objected to as irrelevant, immaterial and incompetent.
Objection sustained.
Defendant excepts.

Q. When did you say I first went to White Oaks?
A. I went to White Oaks two years ago last March.
Q. That would be in March, 1898?
A. 1899.
Q. Do you know whether Mr. Dye was in White Oaks during the fall of 1899, if you were there yourself?
A. Yes, sir; he was there, for I met him almost daily.
Q. And do you know whether he was there continuously from that time up till the time you took your bond and lease, and on until the suit was brought?

A. Yes, he was. He might have gone away for three or four days at a time—no longer.

Q. State whether or not that you expended this four or five thousand dollars in development of the Compromise mine, and made the final payment of $1,500 as you have testified, in reliance upon Mr. Dye's conduct, and assurance given you from time to time as testified, that he had or claimed no interest whatever in this property? Did you or not do that on reliance upon those things?

Mr. CHILDERS: Objected to, upon the ground that it is irrelevant, immaterial and incompetent, and tends in no way to raise an estoppel. The things referred to tend in no way to raise any estoppel, and the records as to the state of the title were equally open
236 to the inspection of both parties.

Objection overruled.

Exception.

A. I did. We were very warm friends at the time, and was up to the day I was served with the papers after this suit had been brought.

Q. While you were developing this property, did you have assays made of the ores, from time to time?

A. Yes; we had assays made from time to time in the office that Dye had charge of, at the works of the Lady Godiva.

Objected to as incompetent, irrelevant and immaterial.

Sustained.

Exception.

Q. State what he knew, Dye knew, if you know, as to the value of the ores you were discovering, and how early he began to get such knowledge?

A. He knew and got the knowledge from the time of the discovery.

Q. And when do you say that was?

A. In August, the latter part of August, I wouldn't be positive. It was along there near the first of September. Of course I forget the exact dates, but it was on or about the first of September.

Q. The bond and option, which you say was in writing, and the deed fromTaliaferro—Jones Taliaferro—conveying the property to you and Crary, are both on record, and the original in existence and will be produced on the trial of this case?

A. Yes, sir; I have them.

Q. How much interest in this mine was mentioned in the bond and option, and deed from Taliaferro referred to, in other words what proportion of the mine is in controversy in this case?
237 A. It was a five-sixths interest.

Q. Who owns the other sixth, if you know?

A. The Gold Apex Mining Company owns the other sixth.

Cross-examination by Mr. CHILDERS:

Q. On the 5th of June, 1900, you entered into a contract in the nature of a bond and lease with Jones Taliaferro for the purchase of the Compromise mine, I believe you said? That bond and lease

was recorded in the proper recorder's office, on the 26th day of September, 1900, wasn't it?

A. I don't know the date; it was in September. I didn't consider it of importance until after the discovery was made, and then I had it put on record.

Q. The consideration mentioned in that bond and lease is $100, isn't it?

A. The consideration was to be $1,500.

Q. Did it mention any consideration as paid in cash at the time of the execution of the bond and lease?

A. Why, it certainly did.

Q. Wasn't that $100?

A. I wouldn't be positive of that.

Q. Was there a sum of $100 paid at the time of the execution of that instrument.

A. There was not.

Q. No money was paid until you paid the $1,500?

A. No, sir.

Q. When was that sum paid?

A. The first of November, 1900.

Q. Have you ever paid any other consideration for the property except this $1,500 to Taliaferro?

A. No, sir, I have not.

Q. On what date did you come into possession of the
238 property under this bond and lease?

A. Fifth of June, 1900.

Q. You entered at once then on possession of the property?

A. Yes, sir; at once.

Q. Who was in possession of it at the time you took possession of it—who turned it over to you?

A. Jones Taliaferro.

Q. You made your first important discovery on the mine in August?

A. Yes, it was in the latter part of August, it might have been the first of September—it was considered the important discovery of rich ore.

Q. Were you to purchase the whole claim for the $1,500?

A. Yes, sir; it is a fractional claim, but it is what is known as the Compromise mine.

Q. That is the total amount of the purchase money that you were to pay?

A. Yes, sir; that is the total amount.

Q. You received a deed for it?

A. Yes, sir; I did.

Q. On what date did you receive that deed?

A. The date I paid the money; the deed was dated before that, as it was a deed in escrow in the Exchange bank; it had been there in escrow for some time. I received the deed the date I paid the money.

Q. What date did you say you paid the money?

A. On or about the first of November.

Q. That was a quit-claim deed, wasn't it?
A. It was written on a quit-claim deed blank.
Q. You say you have the original deed?
A. Yes, sir; I have.
Q. And that you expect to produce it on the trial?
A. Yes, sir; I do.
Q. Did you have it recorded on the same day you received it, or on the following day?
239 A. I mailed it the day I received it, but I think it went the following day, but I mailed it the day I received it.
Q. You say that from the time you entered into possession of this claim to the time that you paid the $1,500, you worked it continuously?
A. Yes, sir.
Q. You expended between $4,000 and $5,000, the books will show that exact amount that you have spent?
A. Yes; my books will show the exact amount that I spent.
Q. Now describe the amount of work that you did on that claim in tunnelling, shafting, drifting and prosecuting, including everything that you did, itemize and describe each separate kind of work?
A. I don't know as I can do that exactly; I can do that afterwards.
Q. I am not asking for dollars and cents, but feet?
A. I can give that. There is about 230 feet, and of course that includes a solid working timbered shaft.
Q. What does this 230 feet consist of, how much shaft, how much tunnel, or other class of work?
A. One hundred and sixteen-foot shaft, the shaft is 8½ by 4½ to the best of my recollection, at 65 foot depth there is a drift to the south of 50 feet. Its dimensions are, about, I should judge—it is an ordinary size working drift, about 6½ feet high, and about 4 feet wide.
Q. That is 166 feet, what is the balance?
A. Then we run a tunnel 70 feet over to west side; 80 feet west main shaft then there is a winze of 35 feet in that tunnel.
Q. What is the balance of the 230?
A. That will make it more than 230, putting that shaft in.
Q. What amount of prospecting did you do?
240 A. We have done any amount of prospecting; almost all the time since we got it.
Q. That is surface work?
A. Surface work.
Q. Have you any way of giving an estimate of that?
A. No, sir; I haven't.
Q. You found nothing by your prospecting?
A. Found nothing of value in the way of ore, only familiarizing ourselves with the ore deposits on the claim.
Q. Will your books show how much you spent in prospecting, as distinguished from this inside work?
A. Yes, sir; they will.

Q. Mr. Dye, you say, was superintending the Lady Godiva from a short time after you went into possession of the Compromise claim?

A. He was in charge of the Godiva at the time, but I am not positive that Dye was in operation until a later date.

Q. It closed down about thirty days before you took up the bond and lease, you say?

A. No, not thirty days before I took up the bond and lease, but thirty days before the proceedings was brought, before I was served with the papers.

Q. You said on your direct examination, referring to the Lady Godiva, they closed down before I took up the bond and lease?

A. I meant before I was served with the papers. They hadn't been closed down at the time I took the bond and lease.

Q. Had they closed down before you took up the bond and lease?

A. That I wouldn't be positive about, it was on or about that time.

Q. How long were they engaged in working the Lady Godiva, and between what dates, after you took possession under the bond and lease, and the time when they closed down?

A. I don't know as I could give the exact dates, but they were running nearly all the time, up to about thirty days before
241 we closed down, were served with the papers.

Q. What date do you give as to the date the big strike was made on the Compromise?

A. It was the latter part of August, or on or about the first of September, as near as I can recollect.

Q. You said on your direct examination, that while you were working on the Compromise mine, and Mr. Dye was working on the Lady Godiva, you and he returned to White Oaks at night, and to your work the next day regularly?

A. We frequently went up and down nights and morning.

Q. Did you travel up and down there together or not?

A. Not regularly.

Q. How often did you ride up and down there in the same buggy with him?

A. Well, the times are too numerous, that I could not give the exact number of times that we rode up and down there together. We had a double rig, and when we would see him going one way or the other, we always hailed him to take a ride, or he came down from the mine and met us at the cross of the road there; the road crosses right below the Godiva mine.

Q. Did you do this systematically or customarily, or cusually?

A. We did it because we were friendly together, as anybody would with a friend coming along or going along.

Q. Then that is just as you happened to meet each other on the road?

A. Just as we happened to meet each other on the road.

Q. Did he have a buggy of his own, too?

A. No, sir.

Q. When did you first observe that you rode together back and forwards, more after you made the big strike, than before?

242 A. He didn't ride with us any oftener before than he did afterwards; it was just about the same, just as we happened to meet him.

Q. You did this just as neighbors would do who are working claims close to each other in mining camps?

A. Certainly.

Q. You say he visited the claim every day nearly?

A. Frequently; I wouldn't say every day. There would be two or three days—frequently.

Q. Would you say that he visited the claim fifteen days out of every month, up to the first of November, 1900?

A. I wouldn't be positive about that, but of course there were days that I would be gone for a few hours at a time, and when I would return the boys would tell me that he had been there, if I did happen to be there. I should judge that he would average almost fifteen days in the month, and that wouldn't miss it very far. And in return, I visited his office at the Godiva mine, as often as he would visit my mine; we were back and forth together.

Q. How many days would you be positive about, of your own knowledge?

A. I would be right positive of ten days of my own knowledge, from the time we discovered the ore.

Q. When was the first conversation that you ever had with Mr. Dye about any adverse claim or title to that of Jones Taliaferro to the Compromise claim?

A. It was about the 23rd of October, 1900. That was the time I asked him the direct question.

Q. Was that the only time that you ever asked him directly whether he or anybody else ever had any adverse claim to the Compromise?

A. Yes, sir; that was the first time, because he had voluntarily told me and assured me, time and time again, both by action
243 and by conversation, and told me that he had once owned an interest in the claim, and had let it go for a debt.

Object to the balance of that answer not responsive to the question, irrelevant and immaterial.

Objection over-ruled.

Plaintiff excepts.

Q. When did he first tell you that voluntarily?

A. He told me that, I guess I can give pretty near the date, that was about, that was on or about the 25th of July.

Q. Who was present?

A. Nobody.

Q. Where was it?

A. That was at the mouth of the old tunnel on the Compromise.

Q. What did he say to you?

A. He told me that he once owned an interest in the mine, and let it go for a debt.

Q. Was that all he said to you on that account?

A. That was all that was said at that time.

Q. When did he next make a voluntary statement on this subject to you?

A. Well, I don't know as I could give the exact time, I don't know as he had—let's see; I don't know as he said anything more to me about it, until I asked the question.

Q. Then you only refer to two conversations on that subject, this voluntary conversation, and this one in October when you asked him the direct question?

A. Yes, sir; because I was about to pay for the mine at that time.

Q. You don't recall any other conversations, except these two, on that subject?

A. No, sir; I do not.

Q. Now, you say Mr. Alexander was present, when you asked him whether there were any hostile claims to this property?

A. Mr. Alexander was there at work on the shaft.

Q. Did you ever have more than one conversation with
244 him on this subject, when Mr. Alexander was present?

A. No, sir.

Q. You say that the question that you asked him was, whether he knew of any conflicting claim or any other claims on the Compromise?

A. Yes, sir; that is the question that was asked.

Q. Was that as near as you can recall the words that were used?

A. Those are the exact words that were used.

Q. He replied that the Scranton claim on the west took off about a hundred feet, and as to other claims, there would be nobody else but himself; now go on and state everything else that he said about his own claim?

A. He says that as for myself, I have allowed all the time to elapse, and I have no claim whatever.

Q. Did you tell him that you were relying upon his answer as to the title?

A. I did not.

Q. How long have you been in the mining business?

A. Since 1889.

Q. Ever had anything to do with mining titles before?

A. Not any that were brought into litigation.

Q. Have you ever taken bonds and leases, sold or purchased mines any before?

A. Yes, sir.

Q. Are you in the habit of relying upon what people tell you, or are you in the habit of having the records examined or examine them yourself?

A. I rely upon all three; I first go to the record, then get all the information I can from parties interested in the camp in the mining business, or otherwise.

Q. Did you go to the records in this case?

A. I did, the very first thing; I had an abstract of title.

Q. Who made your abstract of title for you?

A. The county recorder, Anaya.

Q. It showed the sheriff's deed, from the sheriff to Jones
245 Taliaferro for this property, didn't it?
A. Yes, sir.
Q. Did you have this abstract of title the first thing that you did, before you took the bond and lease?
A. No, sir; I took the bond and lease first.
Q. When did you first get your abstract of title?
A. I don't remember the date, the abstract will show for itself.
Q. It was before you paid this $1,500, wasn't it?
A. O, yes; certainly.
Q. It was before the 23rd day of October, wasn't it?
A. Yes, sir; I am positive of that.
Q. Was it before this voluntary statement of Dye was made to you, which you have related?
A. Now, I won't be positive about that.
Q. Did you have any proceedings of the district court examined upon which this sheriff's deed was based?
A. Yes, sir; I paid an attorney to go from White Oaks to Lincoln to examine the title to this whole thing.
Q. Who was that attorney?
A. R. E. Lund.
Q. About what time did you do this?
A. That I didn't have done until sometime in September; it was in the month of September that I had this done; it was after we made the strike of rich ore that I employed this attorney to go down.
Q. Was that before or after this voluntary statement of Dye's which you have given?
A. That was afterwards.
Q. What report did your attorney make to you about that?
A. He told me that he examined the records carefully, and paid the clerk $4 to assist him to go through the records, and he reported to me that all proceedings of this sheriff's sale was regular
246 and that everything was of record, and that so far as that was concerned, I would be perfectly safe to handle the property.
Q. Now when you came to handling the property, and making this payment, did you rely upon Dye's statement to you, or the opinion of your attorney and this abstract?
A. I relied upon all three. But his visiting the mine every day, it aroused a curiosity in me to know what he was coming there so often *before;* while I felt that it was nothing but friendship, still I wanted to be safe, and that is why I asked him the question; I always want to keep out of trouble if I can.
Q. What did you say to Dye as to relying upon his statement as to his claim, if any, against the property?
A. I didn't say anything; I simply expressed my gratification and was glad that we were all working in harmony in the camp; at that time we were, everybody.
Q. You state that when you first went on the Compromise, there wasn't a pound of pay ore in sight, and of course after we once prospect a claim and give it up, we consider its value less than when we first prospect it; did you prospect it and give it up?

A. No, sir; I did not.
Q. You mean somebody else had prospected it and given it up?
A. Mr. Dye had prospected it and given it up.
Q. He gave it up by its being sold under attachment, didn't he?
A. Yes, sir.
Q. Did you ever know of his giving it up in any other way?
A. No, sir; I did not.
Q. You say that $500 is more than any experienced mining man would have paid for it when you went on it?
A. Yes, sir; I do.

Q. What was there that induced you to go on it and ex-
247 pend four or five thousand dollars?

A. After prospecting three days and finding the large ore, pay ore chute, induced us to go ahead with the work.
Q. A mining man who proposed to purchase it for $500 would go upon it and do some prospecting, wouldn't *it?*
A. It would depend whether he wanted it for prospecting or for speculation on account of other properties around it.
Q. And there were other valuable properties immediately contiguous to this claim, were there not?
A. Yes, sir; there was at one time.
Q. On one side is the North Homestake, isn't there?
A. It is not considered very valuable.
Q. It has been?
A. It has been at one time, but it has been worked out.
Q. A great deal of value has been taken out of it?
A. Yes, sir.
Q. On the other side of the gulch is the Old Abe?
A. The Old Abe would be about 2000 feet east of it.
Q. It is surrounded on all sides by located claims?
A. Yes, sir; it is now. It wasn't at the time of the strike. The claims had been abandoned, but they have been taken up since.
Q. You say Mr. Dye continued to visit the claim, with the same frequency after November the 1st, and until you were served with process in this case, as he had done before?
A. He visited with the same frequency up to the day before I was served with process.
Q. Now you say he gave you no intimation of his intention to bring this suit, but always wished you the best; state exactly what he said by way of wishing the best, and when he said it?
A. Well, he wished me success, and hoped that we would open up a big mine there, at the time that he voluntarily told me that
248 he had let the claim go for a debt.

Q. That is the first occasion that you have referred to?
A. Yes, that was in July, about the 25th, as near as I can tell.
Q. When did he state anything of that kind afterwards?
A. He stated something of that kind at the shaft on or about the 23rd of October, and at that time he assured me that he had no claim whatever in the Compromise.
Q. You have given three conversations in full, haven't you?
A. Oh, I haven't given the conversation in full—of course our

subject at that time had naturally been on the Compromise—talking about the condition of things and the ore conditions on the mine and the possibility of finding it in any other places, and on other claims.

Q. State if you have not given what was said by Dye in these two conversations as to his claim against the Compromise in full?

A. As far as I can remember, I only remember the points that I was mostly interested in; those are the points that I have given, of course there might have been other things said.

Q. Can you give any other occasions, when he wished you the best, as you expressed it?

A. Oh, yes; at different times, while visiting his office at the Godiva mine, he would ask how everything was at the time, and I would reply, "in good condition," and then he would say, I am glad of it, and hope it will continue to be good, and make you lots of money.

Q. Please state with what accuracy you can, when and where such conversations took place, and what was said, omitting for the present the two conversations which you have already given, one in July and the other on the 23rd of October?.

249 A. This last conversation took place in his office that I have just given, and we were back and forth more frequent from September up to then, I don't remember the date in December, it was in December, and at all times when we did converse on the subject of the Compromise mine, he always expressed himself with the same good will.

Q. You can't fix the dates of the times of the conversations, and the substance of the conversations more definitely?

A. No, sir; he would always at all times meet me pleasantly, and he would want me to assist him to locate it, the same vein on the Godiva, and I went over at different times and prospected over there.

Q. Dye was a very friendly man with everybody, wasn't he?

A. He might have been outside of White Oaks, but hasn't many friends in White Oaks, a very few. He might possibly have two or three, but not more than three.

Q. His manner and disposition is friendly?

A. Oh, there is times, when I was on particularly friendly terms with him, that he is very pleasant; he was especially to me. And had told me that he knew I must be paying my attorney down town two or three hundred dollars a year to draw my contracts and papers, and that he would save me that expense and do it for me for nothing, that he was an attorney himself.

Q. You and Crary were working other mining properties in that vicinity *are* you not?

A. Yes, sir; we are yet.

Q. What are they called?

A. One of them the Boston Girl.

Q. You took ore from all your claims to Carpenter, Dye's son-in-law, to have them assayed, didn't you?

A. Yes, sir; but I was having most of my assaying from the Com-

promise done during this period, during the time of the dis-
250 covery and the time the action was brought. I had very lit-
tle work done outside of the Compromise during that time.

Q. What did Carpenter have to do with Dye and this property, except that he was his son-in-law, and was doing the assaying on the Lady Godiva, which claim Dye was superintendent, and Mr. Harrison of St. Louis, the owner?

A. Up to the time they shut down, Mr. Carpenter was employed at the mine, and while not busy at assaying, he was doing other work around the mines. Made himself busy around there all the time.

Q. But that was the mine he was working on, and Harrison was the owner, and Dye was the superintendent?

A. Yes, sir; there was something between them, I suppose, that Dye is to have an interest whenever they get out of debt.

Q. There are several other defendant-, besides you and Crary to this suit, among them Jones Taliaferro and a Mr. Charles Spence, what interest have they in the property now?

A. You will have to ask Mr. Crary when he is on the stand. He sold part of his interest to them, but I don't know what he sold. Paul Mayer is another one, I sold one-half of my interest to him.

Q. These other defendants asquired their interests from Mr. Crary?

A. Yes, Mr. Taliaferro and Mr. Spence bought half of his interest.

Q. Were you in White Oaks on Saturday the 14th inst—14th of June, 1901?

A. No; I came in in the evening; I was over to Turkey Creek—no, we started over here Saturday morning.

251 Q. Did you see Mr. Dye in White Oaks when he returned from El Paso?

A. Yes, sir; I did.

Q. What time did he return?

A. Between eight and nine o'clock Friday night.

Q. Did you ask him to go down to Paul Mayer's livery stable with you?

A. I did.

Q. Who was present at that interview at Mayer's livery stable?

A. Charles Spence, Paul Mayer and Jones Taliaferro.

Q. Where did you have the interview with him in the livery stable?

A. In the office.

Q. You asked him to go in there with you?

A. I did.

Q. You blocked the way, after he got into the office, so he couldn't get out?

A. No, sir.

Q. Was he free to go when he pleased?

A. Stood between him and the door, and I told him he couldn't go out.

Q. You say you stood between him and the door and told him he couldn't go out?

A. Yes, sir; until I got through with him.

Q. Was Paul Mayer and Charles Spence and Jones Taliaferro in the stable when you first went in or did the- follow you down there?

A. They were there; I knew they were there, that is why I invited him down.

Q. How many doors are there to this office?

A. Two.

Q. One goes out to the street, and the other into the stable?

A. Yes, sir.

Q. Which door did you refuse to permit to go out?

A. The front door.

Q. Which door did he enter?

A. He entered the side door.

252 Q. Who barred that door while you were talking to him?

A. Nobody.

Q. Was that door open?

A. No, it was shut.

Q. Was it locked?

A. No, sir.

Q. Did you catch hold of him while you were in there?

A. No, sir; never laid hands on him.

Q. Did you put your hands on his breast?

A. No, sir; never laid my hands on him.

Q. Were you armed?

A. No, sir.

Q. Did you do anything to give him the impression that you were armed?

A. No, sir; not the least in the world.

Q. What did you say to him?

A. I told him, and told him what I meant just what he said, and that is what I did, that he nor no other man, could do any assessment work on the Compromise while I was in possession.

Q. Is that all that you said to him?

A. I told him that I wasn't going to repeat it; that I meant what I said, and that I don't repeat anything that I mean when I say it. I told him that he dasn't do it, and he dasn't.

Q. It is a fact then, and you would not and will not now permit him or anybody else to do any assessment work on the Compromise since you went into possession of it since the 5th of June last?

A. While I am in possession of it.

Q. You have been in possession of it since the fifth day of last June?

A. Yes, sir; since the 5th.

Q. You ordered off and made to go away from the claim, who was digging a trench on there, a day or two before this conversation occurred?

A. I did not; I positively did not.

Q. Do you know anything about that?

A. I know that the man was at work there, Mr. Dye
253 wanted the assessment work done on the Compromise for this year; this occurred last week; he wouldn't stay in camp while

the work was being done, so he ordered his foreman to get a man to do the work. The man that he directed him to hire, wouldn't do the work, so he tried five others. They came to me and told me about it. I immediately got on a horse, and I went to the Eureka mine where they were working, and I asked the foreman if he found a man to do the work on the Compromise, he immediately answered yes, he had a man at work now. I told him that he had to take the man off, and I set the time. When the time was up, I went back and the man had stopped work, then came in this Dye business afterwards.

Q. Did Spence resist his going out of the door at which he entered?

A. No, sir; he did not.

Q. Did any one of the four persons who were present put their hands on him?

A. No, sir.

Q. Have you given all that was said to him by yourself, or by Taliaferro, or Spence or Mayer?

A. They neither of them said a word to him or he to them.

Q. Or he to them?

A. Or he to them.

Redirect examination:

Q. Did Mr. Dye do or offer to do the assessment work on the Compromise claim, in the year 1900, to your knowledge?

A. No, sir; he did not.

Recross:

Q. Didn't Mr. Dye offer to come on the claim, either by himself or agents, in December, 1900, or early in 1901, to do the work?

A. He did not; he never intimated any such thing.

Q. The work was done by Taliaferro, as you understand it, before you went into possession, and by you and Crary since?

A. Yes, I got that from the records—Taliaferro's part of
254 it from the records and I found fresh work on the cross-cut in the inner tunnel, and Taliaferro told me he did that.

(Signed) EUGENE HEINIMAN.

Mr. FERGUSSON: I will read the deposition of Harry C. Crary.

Deposition of Harry C. Crary.

One of the defendants, being introduced as a witness, and having been duly sworn, testified as follows on direct examination by Mr. FERGUSSON:

Q. State your name, age, residence and occupation?

A. Harry C. Crary, age 63 in October, residence White Oaks, New Mexico, and occupation prospector.

Q. Are you one of the defendants in this case?

A. I am.

Q. How long have you lived in White Oaks?

A. Two years the 4th of July.
Q. How long have you been engaged in the business of mining and prospecting?
A. Since 1867.
Q. You know the defendant, B. H. Dye?
A. I do.
Q. Did you take a bond and option, along with the defendant, Eugene Heiniman, on the Compromise claim in White Oaks mining district?
A. I did.
Q. And when?
A. On the 5th day of June, 1900.
Q. From whom did you take the bond and option?
A. Jones Taliaferro.
Q. Did he deliver possession of the mine to you at that time?
A. He did.
Q. Did you take up the bond and option, and purchase the property afterwards, if so, when?
A. On the 1st day of November, 1900.
Q. How much did you pay for it *that* that time, what was the purchase price?
A. $1,500.

255 Q. How soon after June 5th did you begin work on the mine and how long did it continue?
A. We commenced, in a few days, within a week.
Q. How long did the work continue under your operations?
A. Until some time about the 17th or 20th day of January, 1901.
Q. How much money was expended in these operations in prospecting and developing that mine, about?
A. I have not the exact figures, but something like about $6,000.
Q. What business was Mr. Dye engaged in, while you were developing and working this mine, prior to November 1st, when you took up the option?
A. He was superintending the Lady Godiva mine, and having some work done on the Little Nell claim.
Q. Did you see him frequently during this time?
A. Yes, sir.
Q. Did his work and yours take you along the same road, in going and returning from White Oaks to your work?
A. It did.
Q. Did you ever ride together, and if so, about how often, or walk together to and from, during that time?
A. I had my own team, and he often rode up and down.
Q. State whether or not, he visited the mine while you were working during that time, and if so how frequently?
A. He was there often.
Q. Did he know during this time the way in which you were working during that time, if so how frequently?
A. He was there often.
Q. Did he know during this time, the way in which you were

working the mine, under bond and lease, as you say, from Jones Taliaferro?

A. Yes, sir.

Q. How do you know that he had that knowledge?

A. I told him.

256 Q. State whether or not, conversations took place between you and Mr. Dye, either in White Oaks, or along this road which you traveled in common, or on the Compromise mine during this time, on this subject, and on the subject of the development work that you were doing, and if so, how frequently you talked with him on this subject?

A. The first conversation I had with Mr. Dye was a few days after the ore was struck in the tunnel.

Q. Was that the first rich strike, and when was it about that it was struck?

A. It was struck sometime in August.

Q. Were you present when it was struck?

A. I was not.

Q. Where were you?

A. Examining some mining property up on the Ruidoso.

Q. You returned to White Oaks how long after it was struck about?

A. Four or five days.

Q. What miner made the strike?

A. Mr. Fuston.

Q. The witness who has been here today?

A. Yes, sir.

Q. Did you learn from him whether or not Mr. Dye had been up to see the strike before you returned?

Object to the question and answer as hearsay.

Objection sustained.

A. He said he had been there.

Question and answer ruled out and defendant takes an exception.

Q. Did he report any conversation that Mr. Dye had had with him before you got back?

Same objection.

Objection over-ruled.

Plaintiff excepts.

257 Q. Did you pretend to give the exact words or the substance of it?

Objected to.

Q. Now come to the first conversation which you say you had with Mr. Dye, and state when it was with reference to your return, where it was, and all that you can remember of the conversation itself?

Mr. CHILDERS: Objection to that question and answer, upon the ground that it is irrelevant, immaterial and incompetent, and does not tend to raise any estoppel, because the recorded title to the prop-

erty was open to both parties equally, as is already shown by the testimony of the witness Heiniman, who was Crary's partner, that he had caused the records to be searched and examined, and procured an abstract of title, had his attorney to examine it and pass upon the title.

Objection over-ruled.

Mr. Childers excepts.

A. I returned home on Friday evening, and Saturday I took a man by the name of Milligton and some timber, and put in two sets of timber in the mouth of the tunnel and puts doors on them. Monday, Mr. Dye came there while I was there. I took him through the tunnel, showed him the ore, and how it laid in there, panned some for him; and we went up to the mouth of the old tunnel to show how I came to get onto the ore. I explained the trench run from the old tunnel out to the west. I saw the ledge of quartz *prophry*, and examined it closely for blossom that might have been thrown out along the bank while this trench was being done. I showed him the float that I had found there, where I had dug in and discovered the lead, and that when I had gone down the hill and run this cross-cut tunnel to strike the ore at a depth. I then
258 took him to the mouth of the tunnel, and showed him upon the bank some float must have been thrown out when they started the tunnel, which led me to think that the ore was in the tunnel when they first started on that vein. I then cross-cut-ed across the entrance of the old tunnel where they had done their work; that I had found these indications, and went to Mr. Taliaferro and secured an option upon the property, telling him the time and terms of the option. He said that he had owned the property and that he knew of this ore in the mouth of this old tunnel and had somee assays out of it, but that it was not of sufficient value to warrant his working on it, specially as at that time, there was no way to treat these sulphides, even if they had been worth $50 a ton, that they had done a great deal of work there, but had failed to catch any ore of sufficient value to warrant working the claim; that he had allowed his time to expire and hoped that we would do well on it, that he made no claim to it, as he had owned the property on the other side of the gulch; and if we could get good ore there, it would make his Little Nell property more valuable. I think that is probably all the conversation that occurred at that time. I was elated over the discovery of this ore, both of us talked a good deal and both of us felt good.

Q. Do you remember a conversation between Dye and yourself and Heiniman, at which one F. B. Alexander was present, who was working for you?

A. I do.

Q. About when was that conversation?

A. I don't remember the exact day.

Q. Was it before or after this option was taken up and mine paid for?

A. It was before.

259 Q. Give that conversation, as near as you can remember it, stating how it came up, if you know?

Same objection as made to the last preceding question relating to conversations.

Same ruling.

Exception.

A. Mr. Dye was there, and Mr. Heiniman asked him, I can hardly remember the exact words, but in substance whether the title to this property, the Compromise mine, was all right. Mr. Dye replied that there was some drawn ground between it and the Scranton, and it on the side that would belong to the Scranton. It was an over-lap; that there could be no other claimant, unless it was him, and he had allowed his time to lapse and made no further claims to the property. He also added, I hope you will do well with the property, and make lots of money out of it.

Q. Do you know what purpose Heiniman had in making that inquiry at that particular time?

Objected to as irrelevant, immaterial and incompetent as — what his purpose was.

Objection sustained.

Defendant excepts.

Q. If you had learned at that time, you and Heiniman, from Mr. Dye, that he expected to assert any claim against the property, state whether or not you would have completed the payment for it?

Same objection to that.

Over-ruled.

Plaintiff excepts.

A. I don't think we would.

Q. State whether or not, that you spent the money that you have mentioned in developing said property, and in finally paying

260 for it and taking a deed to it, in reliance upon Mr. Dye's statements that you have detailed, and upon his course of conduct while you were operating the mine under that bond and lease?

Objected to as irrelevant, and that a party to a suit cannot make evidence for himself, in his own favor, as to what his intentions were.

Same ruling.

Exception.

A. We done the work, and paid the payment on the repeated assurance of Mr. Dye that he made no claim to it, and would not have touched the property in the first place had we known that he made a claim or had a claim.

Q. State whether or not, Mr. Dye, at any time, while your operations were going on under that bond and lease, ever did anything to your knowledge, or said anything to you, indicating that he had or would make any claim on the property, or give you any warning in any other way?

Same objection and it is also leading.
Objection sustained.
Defendant excepts.

A. He did not.

Q. What was the cash value of the Compromise in your opinion just before your operations began on it under the bond and lease, before you discovered any indications of ore?

Objected to as immaterial and irrelevant, answer hearsay.
Objection sustained.
Defendant excepts.

A. I don't consider that it had any cash value. If I had not discovered ore within a few days, I should have dropped the property.

261 Q. What was the property worth, at the time you shut down, after the suit was brought?

Same objection.
Objection sustained.
Defendant excepts.

Q. What is your opinion as to what it was actually worth?

Same objection.
Objection sustained.
Defendant excepts.

A. (As read to the jury by Mr. Fergusson.) I think it was worth $45,000.

Q. You have detailed two conversations with Mr. Dye relative to your bond and lease, and the title to the mine, state whether or not there were others, long or short, during that time?

Same objection.
Overruled.
Plaintiff excepts.

A. He was often there, often rode down to town with us, and during this time we often talked together in relation to the property. In which conversation he always gave me the same impression, as in the two conversations.

Q. Did Jones Taliaferro part with all his interest in that deed delivered November 1st, to you and Heiniman?

A. He did.

Q. He has required an interest since, has he not?

A. He has.

Q. Did he or not have any interest whatever in that property between the time that he made the deed, delivered the deed November 1, 1900, and the time when he had subsequently acquired an interest?

A. None whatever.

262 Q. From whom did he acquire this interest that he now holds?

A. Myself.

Q. When did you first learn, after you finally paid for the prop-

erty November 1st, 1900, that Dye claimed or was asserting any interest in that Compromise claim?

A. On the 17th day of January, 1901, when when we were served with the summons.

It was agreed that it may be stated on the record that the deposition- of Eugene Heiniman and Harry C. Crary were taken the forepart of June, 1901.

The defendant reads in evidence the testimony of John A. Haley.

JOHN A. HALEY, called by defendants, having been duly sworn, testified as follows, in open court:

Direct examination by Mr. FERGUSSON:

Q. What is your name?
A. John A. Haley.
Q. Where do you live?
A. White Oaks, New Mexico.
Q. What is your business?
A. My last business has been school teacher.
Q. What else have you been engaged in at White Oaks?
A. I have mined some in White Oaks.
Q. Do you know B. H. Dye, the plaintiff?
A. Yes, sir.
Q. Have you had any conversation with him relative to the facts in this case?

Mr. CHILDERS: I would like to have Mr. Dye present while this witness testifies.

Mr. FERGUSSON: We can take up Mr. Owen's testimony. Witness excused for the present.

JOHN A. HALEY recalled for further examination, testified on direct examination by Mr. Fergusson:

Q. State whether you ever had conversation with Mr. Dye
263 relative to the Compromise mine, and if so, when and where?

A. I have. To the best of my recollection it was in August of last year in his room, or rather his office in White Oaks, N. M.

Q. State how the conversation came to occur, and then tell in you own words, as near as you can remember the conversation itself?

A. It was on Thursday evening. I was just stepping out of the lodge room, and just across a little hall was Professor Dye's office. His door was open. I stepped to the door; he was sitting there, and said, come in. I went in and began talking to him about a little matter of personal business, of which I had spoken to him before. We talked some time, and I was about getting ready to leave; just how the conversation came up I cannot remember, but the question, however, did come up with reference to men's temperaments, and I remarked to Professor Dye that I very often envied him his easy disposition, never showing when he was offended or pleased, and jokingly remarked that it was a much talked of question, you might

say, that in a polker game he would sit down and lose a jackpot, and never mourn or swear, and if he won he didn't show any pleasure over it, no smile or anything accompanied it, and Professor Dye remarked: Yes, I am credited for being very cool-headed, and of a nature of that character, but he says I have not always been that way. Years ago I had trouble, and I got into fights, and so on, and I didn't always fight with my fists—but twenty years, for the last twenty years, I have decided that I would never strike a man unless it was for my own personal protection, and just the other evening I ran up the steps with two pistols on, to avoid shooting a man, and I remarked I suppose that is the one that has been talked about
264 on the street, and he replied yes. Then the question came up about the Compromise, and the talk was on that.

Object- to the question and answer as irrelevant, immaterial and goes into matters that have not the remotest bearing on this question.
Question and answer withdrawn.
Exception.

Q. Now that is what I want you to give, as near as you can.

—. ——.

Q. Now go ahead and give the conversation about the Compromise?

A. Professor Dye said that before leaving White Oaks, which I think was in the year 1897, that he was on a deal with T. C. Johns to sell his interest to T. C. Johns in the Compromise, that T. C. Johns had made him an offer, that he refused it, but in turn made Johns an offer. Johns left without effecting any deal; Mr. Dye said that he also left later, and failed to meet Johns in Denver, and subsequent to that time he, Dye, returned to Ohio, and there became in straightened circumstances, and ultimately wrote Mr. Johns that he never had any reply, and in 1899, I think, in the spring of 1899, he returned to this country, and came through Denver, and again failed to find Mr. Johns, but it seems——

Mr. CHILDERS: Are you telling what he said?

—. Well, this should have been said before. He spoke about leaving Joe Gumm to accept the money from Dye—from Johns, I mean, in case Johns came to his terms, and he wrote in this letter for Johns to pay Gumm the money. When he came through Denver and failed to find Johns, he came on to White Oaks, and there found that Johns had not paid Gumm the money, hadn't taken the mine, or his interest, and found the property in other people's possession,
265 and then just let the matter go along without ever taking any steps, but later on, I think in the year 1900, he saw an interview with Jones Taliaferro in the El Paso paper, I think the Industrial Record, and he said no names were called, but everybody in White Oaks knew to whom it referred when the mine had been sold for debt, and said that it made him mad, and he began studying over the matter, and that perhaps Wharton might have made a mistake in the suit, and he looked the matter up and found it in effect so, and brought the suit. And as near as I can remember, his remark

at that point was that he probably never would have brought this suit but for this incident in the paper.

Objected to as immaterial and irrelevant and incompetent.

Objection over-ruled to all of the answer except that portion as follows:

"When he came through Denver and failed to find Johns, he came on to White Oaks, and there found that Johns had not paid Gumm the money, hadn't taken the mine, or his interest, and found the property in other people's possession, and then just let the matter go along without ever taking any steps, but later on, I think in the year 1900, he saw an interview with Jones Taliaferro in the El Paso paper, I think the Industrial Record, and he said no names were called, but everybody in White Oaks knew to whom it referred when the mine had been sold for debt, and said that it made him mad, and he began studying over the matter, and that perhaps Wharton might have made a mistake in the suit, and he looked the matter up and found it in effect so, and brought the suit. And as near as I can remember, his re-
266 mark at that point was that he probably never would have brought this suit but for this incident in the paper."

Plaintiff excepts to the admissibility of any of it, wholly immaterial and incompetent.

Q. Is that the substance of it all?

A. That is the substance of the talk. The talk lasted some little time, and he went on to say further that he now had no uneasiness about the suit whatever, that it wasn't giving him any trouble at all.

Defendant reads in evidence the testimony of John W. Owen.

JOHN W. OWEN, called by defendants, having been duly sworn, testified in open court, as follows:

Direct examination by Mr. FERGUSSON:

Q. What is your name?

A. John W. Owen.

Q. Where do you live?

A. In White Oaks.

Q. How long have you lived there?

A. Eighteen years.

Q. What is your business?

A. Well, I have been deputy sheriff and constable at White Oaks for a good many years.

Q. What position, if any, did you hold on the 19th of February and some time prior, 1899?

A. I was deputy sheriff.

Q. Of what county?

A. Lincoln County.

Q. Who was the sheriff of the county at that time?

A. Mr. Perea.

Q. Demetrio Perea?

A. Yes.

Q. What connection, if any, did you have with the sale of a mine known as the Compromise mine, in the White Oaks mining district, Lincoln County, New Mexico, in the suit of Jones Taliaferro vs. Benjamin H. Dye?

A. I sold the property.

267 Q. Were you the officer that made the return in evidence in this case of that sale?

A. Yes, sir.

Q. Have you a commission as deputy sheriff, or did you at that time?

A. Yes, sir.

Q. Have you that commission?

Mr. CHILDERS: We are not raising any question about the fact that the sale was made by a deputy sheriff.

COURT: You admit then, that the witness was the deputy sheriff?

Mr. CHILDERS: Certainly, that he was a regularly appointed deputy sheriff under Demetrio Perea, sheriff of Lincoln County, at the time the property was sold.

Mr. FERGUSSON: Under a written commission?

Mr. CHILDERS: If you want it, a written commission, yes.

Witness excused.

The next witness is Thomas H. Walsh, part of whose testimony Mr. Childers read on his side of his case yesterday.

THOMAS H. WALSH, called for the defense, having been duly sworn, testified in open court as follows:

Examined by Mr. FERGUSSON:

Q. What is your name?

A. Thomas H. Walsh.

Q. Where do you live?

A. White Oaks.

Q. How long have you lived there?

A. Four years.

Q. What is your business?

A. Well, I have charge of the Apex Gold Mining Company's property there.

Q. What ownership, if any, has that company, or what ownership does it claim to have, in the Compromise mine, part of which is in controversy in this suit?

A. They claim one-sixth.

Q. What relation have you had to the mine, in consequence 268 of being the agent of that company in the past two or three years?

A. I have had charge of their interests in White Oaks.

Q. And what relation did that put you in with the mine, whether you were in possession of it, or not?

A. -ing in charge of that interest of the Apex, and looking after their interest, of course I looked after Compromise part of it.

Q. Who did the assessment work on that mine in 1898?

A. I did it for—that is, myself and another party for the Apex Mining Company.

Q. What relation had Mr. T. C. Johns to it?

A. He was the manager of the company.

Q. State whether or not Mr. Dye or anyone for him, did any assessment work on that mine in 1898?

A. No, sir; he did not.

Q. State whether or not the full hundred dollars' worth of work, the full assessment, was done, or whether the mine was fully represented for that year?

A. There was one hundred and three dollars' worth of work done.

Q. By whom?

A. By the Apex Gold Mining Company, with Johns as manager.

Q. Who paid for that?

Objected to as immaterial and irrelevant — to who paid for it.

By the COURT: Let the question go, let that be disposed of along with the rest of the testimony.

Objection over-ruled temporarily.

Exception.

A. Mr. Taliaferro paid——

Q. First? Who paid the one hundred dollars out in the first instance?

A. T. C. Johns as manager of the Company.

269 Q. State who did the assessment work, if it was done, in 1899?

Objected to as immaterial does not, doesn't make any difference work he did in 1899.

By the COURT: You can get this fact in and settle all these questions at the final end.

Exception.

A. Mr. Jones Taliaferro.

Q. For whom did he do it?

A. After he got charge of this interest that he was entitled to?

Object to the opinion whether he was entitled to it or not after he got charge of this interest that he was entitled to.

Withdrawn.

Q. Just say?

A. Well, I felt as though he was entitled to it, but I will leave that part of it out. Mr. Taliaferro done it.

Q. State whether or not you were still in possession, as agent, of that mine in with Mr. Taliaferro during that year 1899?

A. Yes, sir.

Q. State whether or not during that year Mr. Dye did any assessment work at all?

A. I didn't see him do any assessment work at all.

Same objection.

Same ruling.

Exception.

Q. What application, if any, did he make to you to permit him to do that assessment work?

Same objection.
Same ruling.
Exception.

A. None whatever.

270 Q. State whether or not Mr. Johns, or you for him, got back the five-sixths of the hundred dollars that was paid by Mr. Johns for the assessment work on that mine for 1898, and from whom he got his back?

Objected to as irrelevant, immaterial and incompetent.
Same ruling.
Exception.

A. I got back five-sixths of that money from Mr. Jones Taliaferro, under orders from the manager of the Apex Gold Mining Company. My orders was to give credit to the Apex Gold Mining Company for any claim I had against the Apex, and accept the money from Mr. Jones Taliaferro.

Q. Look at the paper handed you, and state if you recognize it?

Objected to.

A. Yes, sir. This is my signature.

Mr. FERGUSSON: I offer this in evidence. It is the receipt for the money, that he gave at the time he paid.

Same objection.
Same ruling.
Exception.

Defendant's Exhibit 1 read.

DEFENDANT'S EXHIBIT 1.

JUNE 15TH, 1899.

Received of Jones Taliaferro, eighty-three and thirty-five one-hundredths dollars, in full payment for assessment work on the "Compromise" mining claim situated in White Oaks Mining District, Lincoln County, N. M., for the year 1898; said payment being in full for assessment on five-sixths of said mining claim.

T. C. JOHNS,
By THOS. H. WALSH.

271 Q. State whether or not after Mr. Dye returned to White Oaks in the spring of 1899, he offered to pay this money that Jones Taliaferro subsequently paid?

Objected to as immaterial and irrelevant.
Same ruling.
Exception.

A. No, sir.

Q. Did he, after you received the money from Jones Taliaferro, at any time during that year, offer to pay this money?

Same objection.
Same ruling.
Plaintiff excepts.

A. No, sir.

Q. Who was in the possession of that mine, or did the possession of it obtained in 1899 continue during 1900?

A. Yes, sir. During 1900, and up to the present time; I am in charge of the property right now. I live on the property.

Q. State who did the assessment work on that property for the year 1900?

A. For the year 1900 it was Mr. Crary and Heiniman.

Q. They did it representing the whole property? Did they do your one-sixth as well as the five-sixths?

A. They did it, and the Apex Mining Company in Boston paid their one-sixth proportion.

Q. State whether Mr. Dye either did or offered to do, or made any attempt to do the assessment work on that claim for 1900?

Same objection.
Same ruling.
Exception.

A. Not to the best of my knowledge and belief—In 1900.

272 Q. That is what I am asking about.

A. Not that I know of.

Q. Were you in the possession, so that you would have known of it if he had done it?

A. Yes, sir.

Cross-examination by Mr. CHILDERS:

Q. You say that in 1898 you did the work for the Apex Gold Mining Company on this claim?

A. Yes, sir.

Q. Is the Apex Gold Mining Company an incorporated company?

A. I guess they are, yes.

Q. When did they become possessed of the interest of Johns, the one-sixth in this claim? When did they acquire it?

A. I don't know about the dealings of Mr. Johns and the Apex, except that I took my orders from the manager.

Q. What time in 1898 was the work done?

A. Com-enced on August 2.

Q. At that time did you understand that Mr. Johns was acting for himself, or as manager of the Apex Gold Mining Company?

A. I understood that he was acting for the Apex Gold Mining Company; he was the manager.

Q. This receipt is signed by T. C. Johns, by Thos. H. Walsh?

A. Yes, sir.

Q. You took this receipt, then, acting for Mr. Johns?

A. If there was any bills paid—? I am just asking you a question.

Q. Go ahead and answer the question.

A. I have done business for Mr. Johns before, and if I would pay any bills, I would merely sign T. C. Johns by T. H. Walsh.

Q. And as you were doing this for Mr. Johns, you signed T. C. Johns by Thomas Walsh?

A. Yes, sir.

273 Q. That is the reason you signed—you were acting for Mr. Johns, therefore you signed T. C. Johns by Thomas Walsh?

A. If I paid a bill——

Q. That can be answered yes or no, and then you can explain afterwards.

A. Yes, I signed T. C. Johns, by Thomas H. Walsh.

Mr. FERGUSSON: I want to ask a question I omitted.

Q. State whether or not you had any conversation with Mr. Dye any time this spring?

A. About a month ago, I should judge.

Q. Give that conversation as near as you can, and how it came to come about?

Objected to
Same ruling.
Exception.

A. About a month or six weeks ago I received a letter in the post-office to call and see Mr. Dye.

Object to any contents of any letter.
Objection over-ruled.
Exception by plaintiff.

By Mr. CHILDERS:

Q. Where is that letter?

A. I left it in White Oaks.

Q. Well?

A. He asked in that letter if I would go and see him at his office. I went up there. He pulled a chair up very close, and seemed to be very sociable.

Object to the whole answer as irrelevant and immaterial and no consequence.

He wanted to know if the other side subpœn-ed me. I told him yes. That means Mr. Crary and Heiniman and Taliaferro, and this other side. But that subpœna was issued a year ago. He said it is no good, and that he would like to have me go with him, and that all my expenses would be paid, and I told him that I didn't

274 want anybody's expenses, and that I was going with the other side, and to tell what I knew, and that I didn't want to have anything more to do with him. That is about the substance of the conversation.

By the COURT: What purpose would that be admissible?

To show the bearing upon the methods of the defendant, Dye.

Objection sustained.
Defendant excepts.
Court in recess until 8 o'clock, June 20th.

Defendant reads in evidence the testimony of Robert E. Lund.

ROBERT E. LUND, called for the defense, having been first duly sworn, in open court, testified as follows:

Examined by Mr. FERGUSSON:

Q. What is your name?
A. Robert E. Lund.
Q. Where do you reside?
A. White Oaks, Lincoln County, New Mexico.
Q. What is your business?
A. An attorney-at-law.
Q. What relation did you sustain to Mr. Heiniman and Crary, defendants in this case about the time they purchased the Compromise mine?
A. I was their attorney and counsellor.
Q. Have you had any commission from them or instructions from them as such attorney and counsellor? To examine the title of the Compromise mine, sometime before they purchased it, if so state what you did in pursuance to those instructions or that employment?
A. I have no means of fixing the date absolutely. It was probably in the month of September or October, 1900, when the question was discussed in my office between a Mr. German of Kansas City,
275 Mr. Heiniman, one of the defendants in this action, and myself, with reference to the title which Heiniman and Crary were able to give to a one-sixth interest of the Compromise mine—I think that answers your question.
Q. No, the question was what you did in any employment you had with reference to examining the title?
A. The question of examining the title came up. Upon the examination of an abstract, as I recall it, an abstract of title from the County Recorder of the County of Lincoln, and without detaining the court and jury with the particulars, it was decided that I should examine the various instruments that were of record and were tabulated in this abstract, and this I did within a day or two probably thereafter. I examined, beginning with the location notice, and ran over the titles to see if they had been properly prepared and executed, and that there were no vital defects, in my opinion, in them; and that is what I did do.
Q. State what, if anything, you did in the course of that employment? Where did you go to make this examination?
A. To Lincoln, the county seat of the county.
Q. To what other place if any did you go in the course of that employment to examine this matter?
A. To no other place, nor to any other source of information. The instructions given me——

Object to instruction, improper and immaterial.
Objection sustained.
Defendant excepts.

——were limited.

Q. What examination if any did you make in consequence of this employment of the District Court records with reference to
276 an attachment suit alleged to have been brought affecting the Compromise mine?

A. Absolutely none.

Q. As I understand you, then, your examination was limited to the records of the title in the probate clerk's office in Lincoln?

A. In the office of the county recorder; yes, sir.

Cross-examination by Mr. CHILDERS:

Q. You examined the record of the sheriff's deed, a certified copy of which has been put in evidence in this case, did you not?

A. The sheriff's deed?

Q. Just say yes or no.

A. Which of them do you mean? There are two.

Q. There is not but one certified copy put in evidence.

A. The sheriff's deed which we treated——

Q. I am not asking you how you treated it now. I am asking you a question which can be answered yes or no. Did you examine the record of that instrument or not?

A. No, sir; I think I did not. I am not able positively to state, but it occurs to me that this was not of record at any time. Oh, I beg your pardon, this is the deed made by the sheriff through the personality of the deputy sheriff—yes, that was examined.

Q. And that was the only instrument of record at that time which showed any title in Jones Taliaferro, wasn't it?

A. Speaking now from memory,—I haven't the abstract,—I remember very well that I advised——

Q. I am not asking you what you advised, Mr. Lund.

A. I must answer the question in my own way. No, I don't remember as to that, sir.

Q. Did you examine any other instrument of record through which the title could be traced in any manner out of Benjamin H. Dye into Jones Taliaferro? If so, what was that instrument?

A. I didn't charge my mind at the time, nor can I now
277 speak positively of the various instruments or chains in the title up to that time.

Q. What is your best impression as to whether you examined any other instruments which showed the conveyance of the title of Benjamin H. Dye to Jones Taliaferro, other than the instrument a copy of which you hold in your hands?

A. I could find difficulty in answering that. My own impression as to this was that this should be treated as a certificate of sale.

Q. You say you are a member of bar and you know that when I object you are not to answer until the court permits you to do it. I am asking the witness for facts, and I ask the court to have the witness not to interpose any expressions of opinion.

A. I don't recall any definite impressions at that point other than those I have stated.

Q. But your best impression is that you did examine the record of that instrument which you hold in your hands?

A. Yes, sir; I think I drew this deed.

Q. I understand you to say you drew it?

A. I think I did at the request of the deputy sheriff. But I wasn't acting as attorney in the matter at that time. It was purely a clerical service.

Q. But that circumstance makes you more or less familiar with that deed?

A. Very possibly; and I have seen it very frequently since, Mr. Fergusson.

Q. Did you execute the commission or employment entrusted to you at that time fully according to instructions?

Objected to because it comes back to instructions.

Objection sustained.

Defendant excepts.

278 Q. You say you examined that deed to Tal-aferro from the deputy sheriff, but I understood you to say on direct examination that you began with the location notice of the Compromise?

A. Yes, that was one item that I was somewhat careful about, and examined it with care, and read it over as it was of record. I didn't get any certified copy, but I read it carefully.

Witness excused.

Defendant offers to read in evidence the testimony of J. E. Wharton.

J. E. WHARTON, called on behalf of the defendants, having been duly sworn in open court, testified as follows:

Direct examination by Mr. FERGUSSON:

Q. What is your name?

A. J. E. Wharton.

Q. Residence and occupation?

A. I reside at White Oaks, New Mexico, and am a lawyer.

Q. Were you the attorney of Jones Taliaferro in a suit brought in the spring of 1898 against Benjamin H. Dye, a suit by attachment, in which suit the Compromise mine was levied upon and sold?

A. I was.

Q. State whether or not when the judgment was taken the court inquired into the circumstances concerning the publication of the notice, and alias writ of attachment?

Objected to.

Objection withdrawn.

A. I don't remember that the court made any inquiry of me prior to the time that I suggested to the court—that I presented the facts to the court.

Q. You mean to get your judgment?
A. Yes, sir; I remember of presenting the matter to the court.
Q. Were the facts presented to the court?
279 A. I presented the facts to the court, I remember that; I don't remember of any inquiry of the court prior to that time, prior to the time that I presented the matter to the court. It was on my suggestion that the matter was considered by the court.

By the COURT: There is, of course, no objection before the court as the court has announced several times that the question of procedure on attachment issue is not in this case, having been settled upon, what theory do you read this? I want to make the record.
Mr. CHILDERS: I will consider it all as offered.
Mr. Fergusson offers the testimony of J. E. Wharton.

Cross-examination by Mr. CHILDERS:

Q. What did you present to the court in the way of records?
A. Nothing; I didn't make any record in the matter.
Q. There had never been but one advertisement or notice by publication, had there?
A. My recollection, Mr. Childers, is that there was I had it firmly impressed upon my mind that there was a second advertisement, and I thought that was the record that was here until I came over at this time.
Q. What paper was it published in the second time?
A. Well, it must have been in the White Oaks Eagle.
Q. That paper is in existence, isn't it?
A. Yes, sir.
Q. That is a mere matter of recollection on your part?
A. That is all. It is the impression that I had. I was fully convinced of it, though, and thought that was the record until I came.
Q. Merely amounts to an impression?
A. Well, it was a fixed belief until I came here — found that it was not in the record.
280 Q. The alias writ of attachment was issued upon application to the clerk of the court, was it not, and not to the judge?
A. No; I referred the matter also to the judge.
Q. At the time that the alias writ was issued?
A. Before it was issued, but my remembrance of it was not clear enough to state whether I had any conversation with the court about it or whether I wrote to him about it. My recollection is that I wrote to the judge and then afterwards to the clerk in regard to it.
Q. Did you procure any order for the issuance of the *venditioni* or not?
A. I think so; I don't remember.
Q. O, was it issued merely by the clerk, without any application to the court?
A. My recollection is that I wrote to the court and made the application to the court.
Q. By mail?
A. Yes, sir; I was frequently over here and sometimes presented

things personally to the court, spoke to him about it; was here very frequently during the time of Judge Leland's term, but my recollection is not clear enough to state whether I wrote him as to that matter or whether it was a matter of conversation.

Q. It was clear at the time the judgment was entered?

A. I am not positive—it seems Mr. Griffith was—I haven't paid any attention to the records recently to refresh my memory.

That is all.

Mr. CHILDERS: I object to all the evidence as irrelevant and immaterial, all the testimony of Mr. Wharton upon the subject of the application to the judge and what was submitted to the judge, what was done both direct and cross-examination.

281 Objection sustained.

Defendant excepts.

Defendant offers to read in evidence the testimony of Jones Taliaferro.

JONES TALIAFERRO, called for defense, having been duly sworn, testified in open court as follows:

Direct examination by Mr. FERGUSSON:

Q. State your name?

A. Jones Taliaferro.

Q. Where do you live?

A. White Oaks, New Mexico.

Q. How long have you lived there?

A. Since the spring of 1880.

Q. What is your business there?

A. I am engaged in the mercantile business.

Q. Are you one of the defendants in this suit?

A. I am.

Q. With reference to an interview that was spoken of awhile ago, did you hear the testimony of Mr. Haley?

A. Yes, sir.

Q. Where were you in October, 1900?

A. I left White Oaks about the first day of October, 1900, on my way east, and stopped a day in El Paso.

Objected to; immaterial and irrelevant.

Objection overruled.

Plaintiff excepts.

Q. State when the interview that has been spoken about occurred?

A. It was during the first days of October, 1900.

Objection to the question and answer.

Objection overruled.

Exception.

282 Q. You are one of the defendants in this case are you?

A. Yes, sir.

Q. You purchased this mine when it was sold under the at-

tachment proceedings that have been put in evidence in this case?

A. Yes, sir.

Q. This is the original deed. Look at this paper and state what it is?

A. This is the sheriff's deed, from the sheriff of Lincoln County to me.

Mr. FERGUSSON: That is offered in evidence. Received and marked "Defendant's Exhibit 2."

DEFENDANT'S EXHIBIT 2.

Sheriff's Deed.

Whereas, Jones Taliaferro, of the County of Lincoln, New Mexico, did on the 31st day of December, in Vacation A. D. eighteen hundred and ninety-eight of the District Court of Lincoln County in the Territory of New Mexico, recover a judgment against Benjamin H. Dye, late of the said county of Lincoln, for the sum of one hundred and forty-three dollars damages and costs of suit upon which judgment and execution was issued, dated the 31st day of December, A. D. eighteen hundred and ninety-eight, directed to the sheriff of Lincoln county to execute, and by virtue of said execution Demetrio Perea, the sheriff of said county, levied upon the premises hereinafter d-scribed to wit: All the right, title and interest of the said B. H. Dye in and to the mine or mining claim known as the "Compromise," situated on Baxter Mountain, in White Oaks Mining District, Lincoln County, New Mexico; and the time and place of the sale thereof having been duly advertised and said premises having been duly appraised according to law, the same was struck off and sold to Jones Taliaferro, the said plaintiff,
283 he being the highest bidder therefor and the same being not less than two-thirds the appraised value thereof, for the sum of $227.55, two hundred, twenty-seven and fifty-five one hundredths dollars.

Now, therefore, know all men by these presents, that I, Demetrio Perea, sheriff of said County of Lincoln, and successor of the said —— —— late sheriff as aforesaid, in consideration of the premises, and for the further consideration of two hundred, twenty-seven and fifty-five one-hundredths dollars to me in hand paid by the said Jones Taliaferro, the receipt of which is hereby acknowledged, do hereby convey to the said Jones Taliaferro, his heirs and assigns, the following described lot or parcel of land, to-wit: All the right, title and interest of the said defendant Benjamin H. Dye in and to the mine or mining claim known as the "Compromise," situated on Baxter Mountain in White Oaks mining district, Lincoln County, New Mexico.

To have and to hold the same, with all the appurtenances thereto belonging, to the said Jones Taliaferro, his heirs and assigns forever.

Witness my hand and seal, this eighteenth day of February, in the year 1899.

[SEAL.]

DEMETRIO PEREA,
By JOHN W. OWEN,
Deputy Sheriff.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, Robert E. Lund, a notary public in and for said county, do certify that Demetrio Perea, sheriff of said Lincoln County, by John W. Owen, deputy sheriff, personally known to me to be the same person whose name is subscribed to the within deed, appeared before me this day in person and acknowledged that he exe-
284 cuted the said deed, as such sheriff, as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal this eighteenth day of February, A. D. 1899.

ROBERT E. LUND,
Notary Public.

(Notarial seal affixed.)

Endorsed: Sheriff's deed. Sheriff of Lincoln County to Jones Taliaferro.

TERRITORY OF NEW MEXICO, *Lincoln County, ss:*

This deed was filed for record on the 16th day of June, A. D. 1899, and duly recorded in Book — of Page —.

—— ——, *Recorder.*

TERRITORY OF NEW MEXICO, *Lincoln County, ss:*

Filed for record this 16th day of June, A. D. 1899, at 5 o'clock p. m., and recorded in Book "R," on page 368.

I. L. ANALLA,
Probate Clerk and ex-Officio Recorder,
Per GEORGE SENA, *Deputy.*

(50 cents revenue stamp affixed.)

Q. Did you get possession of the mine under that deed?
A. Yes, sir.
Q. Here is the deed from the sheriff himself, that was made subsequently.

Mr. FERGUSSON: I will introduce that deed. Received and marked "Defendant's Exhibit 3."

DEFENDANT'S EXHIBIT 3.

Sheriff's Deed.

Whereas, Jones Taliaferro of the County of Lincoln, New Mexico, did, on the 31st day of December, in vacation term, A. D. eighteen hundred and ninety-eight, of the District Court of Lincoln
285 County, in the Territory of New Mexico, recover a judgment against Benjamin H. Dye, late of the said County of Lincoln, for the sum of one hundred and forty-three dollars damages and costs of suit, upon which judgment and execution was issued, dated the 31st day of December, A. D. eighteen hundred and ninety-eight, directed to the sheriff of Lincoln County to execute, and by virtue of said execution Demetrio Perea, then sheriff of said county, levied upon the said premises hereinafter described, to-wit: all the right, title, and interest of said B. H. Dye in and to the mine or mining claim known as the "Compromise," situated on Baxter Mountain, in White Oaks mining district, Lincoln County, New Mexico; and the time and place of the sale thereof having been duly advertised and said premises having been duly appraised according to law, the same was struck off and sold to Jones Taliaferro, the said plaintiff, he being the highest bidder therefor, and the same being not less than two-thirds the appraised value thereof, for the sum of $227.55, two hundred, twenty-seven and fifty-five one-hundredths dollars.

Now, Therefore, Know All men by These Presents, That I, Demetrio Perea, sheriff of said county of Lincoln (and successor of the said —— ——, late sheriff as aforesaid), in consideration of the premises, and for the further consideration of two hundred, twenty-seven and fifty-five one-hundredths dollars, to me in hand paid by the said Jones Taliaferro, the receipt of which is hereby acknowledged, do hereby convey to the said Jones Taliaferro, his heirs and assigns, the following described lot or parcel of land, to-wit: All right, title and interest of the said defendant Benjamin H. Dye
in and to the mine or mining claim known as the "Compro-
286 mise," situated on Baxter Mountain in White Oaks mining district, Lincoln County, New Mexico;

To Have and to Hold the Same, With all the appurtenances thereto belonging, to the said Jones Taliaferro, his heirs and assigns forever.

Witness my hand and seal this 21st day of December, in the year 1900.

[SEAL.] DEMETRIO PEREA,
Sheriff Lincoln County, N. M.

(50c. revenue stamps.)

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, L. Analla, a probate clerk in and for said county, do certify that Demetrio Perea, sheriff of said Lincoln County, personally known to me to be the same person whose name is subscribed to

the within deed, appeared before me this day in person and acknowledged that he executed the said deed, as such sheriff, as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal this 21st day of December, A. D. 1900.

I. L. ANALLA,
Probate Clerk.

(Seal of Probate Court affixed.)

Endorsed: Sheriff's deed. Demetrio Perea, sheriff of Lincoln County, to Jones Taliaferro.

TERRITORY OF NEW MEXICO, *Lincoln County, ss:*

This deed was filed for record on the 1st day of February, A. D. 1901, at 1 p. m., and duly recorded in Book "S" of Deed R., page 174.

I. L. ANALLA, *Recorder.*

Q. Look at that paper, Mr. Taliaferro, and stat- what it is?

A. This is a contract between Mr. Crary and Heiniman and myself leasing them, giving them a lease and bond for six months on five-sixths of the Compromise mine.

287 Q. Did you give them possession under this bond and lease?

A. I did.

Q. When did they go in possession under it?

A. Why, it was in the spring; in the fifth day of June, 1900; they took possession at once.

Mr. FERGUSSON: I offer this in evidence. Marked "Defendant's Exhibit 4."

DEFENDANT'S EXHIBIT 4.

(25c. revenue stamp.)

This Lease and Agreement, made and entered into this fifth day of June, A. D. 1900, between Jones Taliaferro of White Oaks, New Mexico, party of the first part, and Harry C. Crary and Eugene Heiniman, of White Oaks, County of Lincoln, New Mexico, parties of the second part;

Witnesseth, That the said party of the first part for the consideration hereinafter mentioned, has this day leased to the said parties of the second part, all the right, title and interest, consisting of an undivided five-sixths interest in the Compromise lode mining claim, situated on Baxter Mountain, White Oaks mining district, Lincoln County, New Mexico, and subject to the following conditions and reservations, to-wit:

That the said parties of the second part hereby agree and bind themselves to work and develop the said mining claim during the continuance of this lease and contract, and to keep continuously

at work on said claim. It is, however, distinctly understood and agreed that the said parties of the second part also agree and bind themselves to expend in labor at least one hundred dollars on said claim, in any event, and also to make the necessary proof of labor for the annual assessment for the year 1900 on said Compromise claim.

288 The said party of the first part hereby promises and agrees to deliver to the said parties of the second part a quit claim deed, free of all incumbrances, except as to the United States, conveying all his right, title and interest in and unto the aforesaid five-sixths interest to said Compromise lode mining claim, at any time during the continuance of this lease, on the payment to him of the sum of one thousand five hundred dollars ($1,500), in lawful money of the United States, by the said parties of the second part.

This lease is to continue in full force for a period of six months from the date thereof, provided, however, that in the event of the said parties of the second part discontinuing work on this claim, and remaining discontinued for a period of thirty days, at any time during the six months aforementioned, then and in that event this lease and contract shall become null and void, and the said party of the first part shall be empowered and authorized to take full possession and control of said mining claim, and all rights and privileges accruing to the said parties of the second part under this instrument shall be forfeited and annulled.

In Witness Whereof, We have hereunto set our hands and seals this fifth day of June, A. D. 1900.

Signed and sealed at White Oaks, N. M., in the presence of

[SEAL.] JONES TALIAFERRO.
[SEAL.] HARRY C. CRARY.
[SEAL.] EUGENE HEINIMAN.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

On this fifth day of June, 1900, before me personally appeared Jones Taliaferro, Harry C. Cary and Eugene Heiniman, par-
289 ties to above written contract and lease, and they acknowledge that they signed, sealed and delivered the above instrument of writing for the uses, purposes and considerations therein set forth.

Witness my hand and seal the day and year last above written.

JOHN H. CANNING,
Notary Public.

(Notarial seal affixed.)

Endorsed.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Filed for record this 26th day of September, A. D. 1900, at 9 a. m., and recorded on the 27th day of September, 1900, in Book D, of Con. and A., on page 222.

I. L. ANALLA,
Probate Clerk and Ex-officio Recorder,
By J. M. HALL, *Deputy.*

1897

Q. Look at this paper and see what it is?

A. This is the quit claim deed from myself and wife to Harry C. Crary and Eugene Heiniman, for five-sixths interest in the Compromise mine.

Q. Was it made in pursuance of this bond and lease?

A. Yes, sir.

Q. State whether or not the consideration for this deed, $1,500, was paid, and if so, by whom, and when?

A. I made that deed the 1st day of October, and put it in escrow in the bank. I left White Oaks and during my absence the money was paid into the bank and the deed delivered to Mr. Heiniman and Crary, under stipulation had with the cashier of the bank.

Q. And Heiniman and Crary were put in possession of the mine at that time?

A. Yes, sir; they were in possession at that time, and had been since the spring.

Q. Did you receive this $1,500.

A. Yes, sir.

Q. From Heiniman and Crary?

A. Yes, sir.

290 Q. State whether or not all of the interest then owned by you or acquired by you under that sheriff's deed, namely, five-sixths interest in that mine, was sold to Heiniman and Crary?

A. Yes, sir.

Q. Mr. FERGUSSON: We offer this in evidence. Received and marked Exhibit 5.

DEFENDANT'S EXHIBIT 5.

Quit Claim Deed.

This Indenture, made the first day of October, in the year of our Lord, one thousand nine hundred (A. D. 1900), between Jones Taliaferro and Ella M. Taliaferro, his wife, of Lincoln County, New Mexico, parties of the first part, and Harry C. Crary and Eugene Heiniman, both of said Lincoln County, parties of the second part,

Witnesseth, That the said parties of the first part, for and in consideration of the sum of one thousand and five hundred ($1,500) dollars, lawful money of the United States of America, to them in hand paid by the said parties of the second part, the receipt whereof is hereby ack*on*ledged, do by these presents demise, release and forever quit claim unto the said parties of the second part, and to their heirs and assigns, all that certain lot, *peace* or parcel of land situated in the County of Lincoln and Territory of New Mexico, and bounded and particularly described as follows, to-wit: All and every the right, title and interest of the parties of the first part, *and* in and to that certain mining claim located, named and known as the Compromise lode claim, to-wit: That certain five-sixths (5-6ths) of the whole thereof undivided, and lately the property of one Benjamin H. Dye and by due process of law levied upon, taken and

sold at sheriff's sale by said Jones Taliaferro and by sheriff's
291 deed duly conveyed to said Jones Taliaferro as the purchaser thereof, and lying and being in White Oaks mining district, at or near to the head of the westerly branch of Baxter gulch in Baxter mountain, and lying southerly from the "Little Nell" lode claim (patented), and to the west of the "North Homestake" (patented), as more fully appears by the location notice thereof by said Benjamin H. Dye and others, duly of record in the office of the recorder for said county, and to which reference is hereby had as a part hereof, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof absolutely and forever.

To Have and to Hold, All and singular the said premises, together with the appurtenances, unto the said parties of the second part, and unto their heirs and assigns, forever.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

JONES TALIAFERRO [SEAL.]
ELLA M. TALIAFERRO. [SEAL.]

(1.50 revenue stamps.)

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

On this first day of October, A. D. 1900, before me personally appeared Jones Taliaferro and Ella M. Taliaferro (husband and wife), to me known to be the persons described in and who executed the foregoing instrument and acknowledged the same as their free act and deed.

In Witness Whereof, I have hereunto set my hand and
292 affixed my official seal the day and year last above written.

ROB'T E. LUND.
Notary Public.

Endorsed: Quit claim deed. Jones Taliaferro, *et ux.*, to H. C. Crary, E. Heiniman.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I hereby certify that this instrument was filed for record on this 2d day of November, 1900, at 1 o'clock p. m., and duly recorded in the Book S of records of deeds, page- 132-3.

I. L. ANALLA,
Probate Clerk and Ex-officio Recorder,
By J. M. HALL, *Deputy.*

Q. Are you at the present time interested in the Compromise mine?

A. Yes, sir.

Q. When did you re-acquire an interest?

A. Why, it was along in the spring of 1901.
Q. After this suit was brought?
A. Yes, sir.
Q. Have you with you the original deed under which you reacquired this interest?
A. No, sir.
Q. State whether or not during the interval between the 1st of November, 1900, when you sold the mine, as you have testified, to Heiniman and Crary, and the date that you re-purchased an interest, you owned of record, or any other way, by secret arrangement or otherwise, any interest in that Compromise mine?
A. No, sir; I had no interest whatever.
Q. But after the rich strike was made you concluded you would buy back?
A. That wasn't my reason for buying back, particularly.
Q. You say it wasn't?
A. No, sir. These parties, after this suit was brought, insisted on selling me an interest in the mine, in order to fight the case. I believed it a good investment, and bought in again.

Q. Who are the present owners of the mine, under Hein-
293 iman and Crary—that have bought from them?

A. H. B. Fergusson, Paul Mayer, Charles Spence and myself. And the Apex people, I believe, claim a sixth.
Q. Mr. Dye has testified that he returned to White Oaks in April, 1899. What, if anything, did Mr. Dye say to you after returning, about the Compromise mine, of which you were then in possession, or with reference to the debt that he owed you, for which it had been sold under attachment?
A. He never mentioned it to me at all.

Object to the question and answer and move to strike out as immaterial and irrelevant.
By the COURT: I don't think it is admissible.
Mr. Fergusson asked to be heard on the subject.
Objection will be overruled for the present.
Plaintiff excepts.

Q. Were you in White Oaks most of the time while he was there, after he returned?
A. Yes, sir.
Q. Who was in possession of the mine, after you bought it, during the year 1899?
A. The agent of the Apex people and myself.
Q. Who did the assessment work on that mine for 1899?
A. I had it done.

Same objection.
Same ruling.
Exception.

Q. State what offer or attempt, if any, was made by Mr. Dye to do the assessment work in 1899?

A. He never made any attempt whatever to do the assessment work.

Same objection.
Same ruling.
Exception.

294 Q. Did he offer to do, or ask you permission to do it, or anything like that?

Objected to.
Same ruling.
Exception.

A. No, sir.
Q. Does that same answer apply to the next year, 1900?

Same objection.
Overruled.
Plaintiff excepts.

A. Yes, sir.
Q. Mr. Taliaferro, have you been engaged in mining as well as merchandising since you have been in White Oaks?
A. Yes, sir; and stock raising, too, handling sheep.
Q. Have you had enough experience—or what experience have you had as to the value of mines and prospects around White Oaks. Those, for instance, that are located close to the big mines, but nothing found or discovered? Have you dealt in them some, and had some experience as to their value?
A. I have had some experience in developing prospects, but don't pretend to know very much about mining.
Q. With reference to the value of this five-sixths interest in the Compromise mine early in 1899, what was its probable value at that time?

Objected to as irrelevant, immaterial and incompetent.
Objection sustained.
Defendant excepts.

A. I consider it of very little value.
Q. How much did you pay for it at sheriff's sale?

Objected to because the sheriff's deed shows.
295 Objection sustained.
Defendant excepts.

Q. Well state whether or not the price you paid for it, what relation that bore with reference to its actual value at that time?

Objected to as incompetent, immaterial and irrelevant.
Sustained.
Exception.

Q. About what was it worth at that time?
A. I was afraid that I would not get the price I paid.

Q. Just state what in your judgment was a fair value for it.

Object to that.
Sustained.
Exception.

A. Well, I considered it of very little value at the time, and if I would be allowed I could explain why.

The court rules that out down to the question "State whether or not after Mr. Dye returned to White Oaks, in April, 1899, and found you in possession of this mine, he offered to repay you the debt for which you had sold the mine.

Defendant excepts to the court's ruling in excluding that answer and testimony in the case.

(Part excluded.)

"Q. What is your judgment as to the value of it?

A. On account of the mine's location, I thought it possible that I might get the amount of my debt and costs out of that piece of ground. I didn't consider the mine valuable at all, except possibly on account of its location.

Q. What was the value of the mine at the time this suit was brought?

296 By Mr. CHILDERS:

Q. You have never studied the subject of geology, mineralogy, or mining, have you, as a science?

A. No, sir.

Q. You have never been engaged in mining any further than to have a few prospects opened for you, have you?

A. I have spent a great deal of money in prospecting.

Q. But you would not undertake to go into a mine and judge of the value of the mine from the amount of ore disclosed, or the formation of the ground around it, would you, the formation in which the mineral was found?

A. On that claim I would.

Q. I am talking about generally speaking, you would not attempt it, would you?

A. I don't claim to be a mining expert at all.

Q. Well, it does take a mining expert to determine the value of a mine, does it not?

A. A man who has had the experience in prospecting has got to be devoid of all common sense if he could not go into a mine like the Compromise and tell whether or not it is valuable.

Q. You can tell whether there is any ore in sight or not, but you can't, yourself, without the aid of somebody else, determine the value of that ore, can you?

A. I can by panning it.

Q. You can tell the value of that which you panned?

A. Yes, sir.

Q. Did you ever pan any ore out of the Compromise mine?

A. Yes, sir.

Q. Did you ever measure the amount of ore in sight in it?
A. I measured across the top of the sulphide ore that we have there, is all the measurement I ever made.

297 Q. If you were asked to go and examine a mine and report upon the value of it, would you undertake to do so, leaving aside that that is not your business, or any other reason on account of your qualification would you undertake to do so?
A. I would for myself.
Q. For yourself?
A. Yes, sir; I would risk my judgment.
Q. Every prospector in the country will do that, wouldn't they?
A. I don't know as to the other prospectors.
Q. You would do it for yourself?
A. I would do it for myself.
Q. You would consider yourself expert, then, as far as any prospect is concerned for yourself, but not as for other people?
A. Yes, sir.
Q. And that is the extent of your expert knowledge?
A. Yes, sir; as I said before I am not a mining expert, and don't pretend to be; but I would risk my judgment when I was going to make an investment, on a gold proposition especially.
Q. That would be provided that the investment was small. If it run up to forty or fifty thousand dollars, you would want somebody else, too, wouldn't you?
A. Yes, sir; I would want somebody else to see whether I was right or not. I consider it worth at least fifty thousand dollars.
(Excluded to here.)
Q. State whether or not after Mr. Dye returned to White Oaks in April, 1899, and found you in possession of this mine, he offered to repay you the debt for which you had sold the mine?

Mr. CHILDERS: Object to it as irrelevant, immaterial and incompetent.
Overruled.
Plaintiff excepts.

298 A. He did not.
Q. State whether or not within twelve months after that sale he offered to pay you the amount of that judgment and redeem the mine from you?

Mr. CHILDERS: Object to that as irrelevant, immaterial and for the reason the plaintiff was under no obligation to redeem from a void sale.
Objection overruled.
Plaintiff excepts.

A. He did not.

Cross-examination by Mr. CHILDERS:

Q. You stated that yourself, H. B. Fergusson, Charles Spence, Paul Mayer and Van Schoick are now interested in this mine. Is anybody else interested in it besides those persons?
A. Not to my knowledge.

Q. Crary and Heiniman, then, have no interest in it at the present time?

A. None whatever.

Q. I will ask you if you acquired your interest by quit claim deeds, certified copies of which are shown you?

A. Yes, sir.

Q. And the other grantees mentioned in there, Charles Spence, Joseph E. Spence, acquired their interests in the same way, did they, under those two deeds?

A. Yes, sir; I think so. I just glanced at the heading of these copies.

Q. One of these deeds bears date of the 28th day of March and the other bears date of the 5th of July, 1901. I will ask you if that is the date when you acquired the interests, or did you acquire it before that time?

A. I think those are the deeds.

Q. That was after this suit was brought?

A. Yes, sir.

Q. You and Charles Spence and Joseph E. Spence all had
299 notice of the pendency of this suit at the time that you took those deeds, did you?

A. I knew about it.

Q. Well, didn't they know about it?

A. I think so, as to Charles Spence I am certain he knew about it.

Q. Didn't you tell him about it?

A. Yes, sir; we talked about it.

Q. Did you have any conversation with Joseph E. Spence about it?

A. I don't remember that I ever did. He is away out on the ranch. I don't know what I ever did.

Q. Then you say that Mr. Fergusson acquired an interest? He acquired it subsequent to the bringing of the suit, did he not?

A. He acquired an interest, yes, sir, in the spring of 1901. I don't remember just when.

Q. Did he acquire his interest by deed; has he any deed for it, if you know?

A. Yes, sir; we made him a deed.

Q. Do you know whether it is of record?

A. I do not.

Mr. FERGUSSON: It is of record. That is admitted.

Q. Mr. Fergusson had knowledge of the pendency of this suit at the time that he acquired that interest, did he not?

A. Yes, sir.

Q. Who was the other gentleman that you have mentioned as having an interest in it? Van Schoick?

A. I didn't mention him on the start; I overlooked him. Van Schoyck.

Q. When did he acquire his interest?

A. Well, sir; I have forgotten the date. It was sometime after these deeds were made.

Q. He acquired his interest from the grantees of those two deeds?

A. Yes, sir.

300 Q. Did he have knowledge of the fact that this suit was pending at the time he acquired the interest?

Q. You say you talked with him about it at the time?

A. We talked about the suit; yes, sir.

Mr. CHILDERS: We offer these two quit claim deeds in evidence. Marked "Plaintiff's Exhibit Q" and Plaintiff's Exhibit R."

PLAINTIFF'S EXHIBIT Q.

Quit Claim Deed.

This Indenture, Made the 28th day of March, in the year one thousand nine hundred and one, between Harry C. Crary and Catherine M. Crary, his wife, of the first part, and Jones Taliaferro, Charles Spence and Joseph E. Spence, of the second part: Witnesseth, That the said parties of the first part for and in consideration of two thousand and six hundred dollars, lawful money of the United States, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have remised, released, sold, conveyed, and quit claimed, and by these present-, do remise, release, sell, convey and quit claim unto the said parties of the second part and to their heirs and assigns, forever, all the right, title, interest, claim and demand whatsoever of the said parties of the first part, of, in and to the following described lands, tenements and real estate, to-wit:

The undivided one hundred and eleven, four hundred and thirty-two thousandths (111.432) of the mine or mining claim, named and known as the "Compromise Lode Claim," situated in the White Oaks mining district, in Lincoln County, New Mexico, and in Baxter mountain, and westerly from the mine known as the

301 "North Homestake" on the westerly branch of Baxter gulch and southerly from the "Little Nell Lode Claim," and as appears by the location notice of same by Benjamin H. Dye and others of record in the office of the official recorder for said Lincoln County, to which reference is made for full description. This being the same property conveyed to said Harry C. Crary by deed dated October, 1900, by Jones Taliaferro and wife to Harry C. Crary and Eugene Heiniman, of record in the office of probate clerk of said County of Lincoln.

To Have and to Hold, all and singular, the above mentioned and described premises, with the appurtenances and privileges thereunto belonging or in anywise appertaining; and all the estate, right, title, interest and claim whatsoever of the said parties of the first part, either in law or equity, to the only proper use, benefit and behoof of the said parties of the second part, their heirs and assigns forever.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

[SEAL.] HARRY C. CRARY.
[SEAL.] CATHERINE M. CRARY.

(I. R. stamps, $3.00.)

Signed, sealed and delivered in presence of
A. M. BROTHERS.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Be It Remembered, That on this 28th day of March, A. D. one thousand nine hundred and one, before me, the undersigned, a notary public, in and for said county, in the territory aforesaid, personally came Harry C. Crary and Catherine M. Crary, his wife, personally known to me as the persons whose names are subscribed to the foregoing deed, and as parties thereto, and
302 acknowledge that they signed, sealed and delivered the said instrument of writing as their free and voluntary act and for the uses and purposes therein set forth.

And the said Catherine M. Crary being first by me informed of the contents of the instrument, did confess upon an examination separate and in*ed*pendent of her said husband, that she executed the same voluntarily or without the compulsion or illicit influence of her said husband.

Witness my hand and seal the day and year last above written.

JOHN H. CANNING,
Notary Public.
[SEAL.]

Filed for record April 1st, A. D. 1901, at 9 a. m.

I. L. ANALLA, *Recorder.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, I. L. Analla, probate clerk and *ex-officio* recorder in and for the county and territory aforesaid, do hereby certify that the above and foregoing is a true and correct copy of a deed as the same appears of record in my office in Book "S" on pages 199 and 200 of the records of said Lincoln County.

Witness my hand and official — this 9th day of June, A. D., 1902.

I. L. ANALLA,
Probate Clerk and ex-Officio Recorder,
By E. W. HULBERT, *Deputy.*

PLAINTIFF'S EXHIBIT R.

Quit Claim Deed.

303 This Indenture, Made the fifth day of July, one thousand nine hundred and one, between Eugene Heiniman and Eunice Heiniman, his wife, of the first part, and Charles Spence, Joseph E. Spence and Jones Taliaferro, of the second part;

Witnesseth, That the said parties of the first part, for and in consideration of seven hundred and fifty dollars, lawful money of the United States, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have remised, released, sold, conveyed, and quit claimed, and by these presents do remise, release, sell, convey and quit claim unto the said parties of the second part, and to their heirs and assigns forever, all the right, title, interest, claim and demand whatso-ver of the said parties of the first part, of in and to the following described lands, tenements and real estate, to-wit: The undivided one-twelfth (1/12) interest of the mine or mining claim named and known as the "Compromise Mine" or the "Compromise Lode Claim," situated in the White Oaks mining district, Lincoln County, New Mexico, and in Baxter mountain, and westerly from the mine known as the North Homestake on the westerly branch of Baxter gulch, and southerly from the Litle Nell lode claim and as appears by the location notice of same by Benjamin H. Dye and others of record in the office of the official recorder for said Lincoln County, to which reference is made for full description, this being the same property conveyed to said Eugene Heiniman by deed dated October, 1900, by Jones Taliaferro and wife to Harry C. Crary and Eugene Heiniman.

To Have and to Hold, all and singular, the above mentioned and described premises, with the appurtenances and privileges thereunto belonging or in anywise appertaining; and all the
304 estate, right, title, interest and claim whatsoever of the said parties of the first part, either in law or equity, to the only proper use, benefit and behoof of the said parties of the second part, their heirs and assigns forever.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

[SEAL.] EUGENE HEINIMAN.
[SEAL.] EUNICE HEINIMAN.

Signed, sealed and delivered in the presence of

—— ——.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Be it Remembered, That on this 5th day of July, A. D. one thousand nine hundred and one (1901), before the undersigned, a notary public in and for said county, in the territory aforesaid, personally came Eugene Heiniman and Eunice Heiniman, his wife, personally

known to me as the persons whose names are subscribed to the foregoing deed and as parties thereto, and they acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth. And the said Eunice Heiniman, being first by me informed of the contents of the instrument, did confess, upon an examination, separate and independent of her said husband, that she executed the same voluntarily and without the compulsion or illicit influence of her said husband.

Witness my hand and seal the day and year last above written.

EUGENE L. STEWART,
Notary Public.

[SEAL.]

Filed for record July 15th, A. D. 1901, at 9 a. m.

I. L. ANALLA, *Recorder.*

305 TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, I. L. Analla, probate clerk and *ex-officio* recorder in and for the county and territory aforesaid, do hereby certify that the above and foregoing is a true and correct copy of a deed of record in my office as the same appears recorded in Book "S" of the record of deeds on pages 274 and 275.

Witness my hand and official seal this 9th day of July, A. D. 1902.

I. L. ANALLA,
Probate Clerk and ex-Officio Recorder,
By E. W. HULBERT, *Deputy.*

Q. Did anybody else own any interest in this mining claim except Crary and Heiniman at the time this suit was brought?

A. Yes, sir.

Q. Who else?

A. The Apex——

Q. I mean this five-sixths?

A. No, sir; I don't think so. Unless it was under—I don't think there had been any deed passed, they had sold it under a lease and bond to some parties, but that hadn't been completed.

Q. There was a bond out for a title to a man by the name of German, but it was never completed?

A. I think not.

Q. Now, you say you left White Oaks in the first days of October, 1900, to go east, when you reached El Paso?

A. Yes, sir.

Q. When did you return?

A. I returned in November of the same year.

Mr. FERGUSSON: There is one question I want to ask on direct examination.

Q. You heard Mr. Walsh's testimony about the payment
306 of this five-sixths of one hundred dollars that he had spent?

A. Yes, sir.

Q. You paid that, as testified, and got this receipt in evidence?

Object to the testimony as irrelevant, immaterial and incompetent.
Same ruling.
Exception.

A. Yes, sir; I paid it.

Verbal Testimony.

JOHN A. HALEY, a witness called on behalf of the defendant, being first duly sworn, according to law, upon his oath testified as follows, to-wit:

Direct examination by Mr. FERGUSSON:

Q. What is your name?
A. John A. Haley.
Q. Where do you live, Mr. Haley.
A. Capitan, Lincoln County, New Mexico.
Q. What is your occupation now?
A. Newspaper publisher.
Q. What was your occupation in the early part of the year 1900, I mean in 1899.
A. I was publishing a paper at that time.
Q. What paper?
A. White Oaks Eagle.
Q. Where?
A. White Oaks, Lincoln County, New Mexico.
Q. Have you the files of that paper as published during the first six months of the year 1899?
A. Yes, sir.
Q. Have you brough- them here to court with you?
A. Yes, sir.
Q. From what place did you bring them?
A. Capitan, Lincoln County, New Mexico.
307 Q. They were published in White Oaks?
A. Yes, sir.
Q. At the time of this suit I mean?
A. Yes, sir.
Q. How did they get to Capitan?
A. The White Oaks Eagle in 1903 discontinued publication and became what is—was then called the Capitan Progree, and all the files of the Eagle were taken over there and are kept at that office.
Q. State what this bundle is, if you know?
A. That is the file of the White Oaks Eagle of the year 1899.
Q. Will you open and produce what is inside; how did that get to the court here, this bundle, and what you have taken out?
A. I brought it.
Q. State what this book is that you have uncovered and produced?
A. That is a file, one year's file of the White Oaks Eagle containing the year's publication, one of each number.

Q. What sort of a paper was it, weekly or daily?

A. Weekly.

Q. Now produce and point out in here the issues beginning with the first week in January and state what appears in there, if anything, as to the publication notices relative to the non-doing of the assessment work on the Compromise mine?

Object to his stating anything about the contents of the notices; I don't object to his pointing it out; the notice speaks for itself.

By the COURT: He asked him to point out, I understand, any notice referring to the assessment work on the Compromise mine.

Q. For the previous year of 1898; what is the date of the first issue for that year?

A. January fifth.

308 Q. Point out what, if anything, of that nature appears there?

A. On the third page in the fifth column about the center there is a notice, notice of forfeiture.

Q. Now persue that notice through the subsequent files and show, point out the last place where it appears there, the subsequent issues I mean?

A. In the same column on the same page, in January 12th same notice occurs.

By Mr. CHILDERS: If he looks it up he can state that it appears in each week's issue, beginning the 5th of January and ending with the last—with the issue of the last date.

Q. Then if you know from having previously looked it up you may state in one answer in how many issues beginning with the first issue that you pointed out in January, 5th, 1899, in how many issues continuously from that time that notice appears?

A. Sixteen times, including the first and the last.

Q. What would be the date of the last, sixteenth, time, including the last issue?

A. I think it is the 20th of April.

Q. Just look and tell me the last date of the sixteenth?

A. I find it in April 20th and I don't find it subsequent to that.

Q. The April 20th makes the sixteenth time?

Defendant offers that in evidence.

Plaintiff objects to it upon the ground that it does not comply with the law with reference to forfeitures and is not the notice as provided by law and that it—the conditions in no way connect themselves with any title which could be asquired under that notice, and next it appears from the evidence that the amount of the money due to T. C. Johns, the co-owner, with B. H. Dye, to

309 & 310 whom the notice is addressed, was paid before the expiration of ninety days from the date of the last publication of that notice.

Same ruling for the time being.

Plaintiff excepts.

One other ground of objection—additional ground of objection,

that the defendants having entered and claiming under the sheriff's deed in evidence in this case cannot prove an outstanding title to the property or set up any title hostile to the title of the plaintiff, Dye, which was conveyed by the said sheriff's deed; and also another ground of objection that the defendant Taliaferro entered in the possession of the property under the sheriff's deed while that notice was being published and long before the expiration of the date of publication.

Overruled for the time being.

Plaintiff excepts.

Notice of Forfeiture.

To Benjamin H. Dye:

You are hereby notified that I, the undersigned, co-owner with you, have done the necessary assessment work for the year 1898 on the Compromise mine or lode, located in White Oaks mining district, on the east slope of Baxter mountain, and you are hereby notified that unless you contribute your proportion of said expenditure within ninety days (90) of the end of this notice of publication your interest therein will be forfeited and become the property of the undersigned.

T. C. JOHNS.

Mr. CHILDERS being first duly sworn according to law, upon his oath testified as follows, to-wit:

311 Examined by Mr. FERGUSSON:

Q. Look at this notice and state whether you received it at the time indicated below?

A. It is signed by me and I have no doubt I received it or it would not be signed by me.

Mr. CHILDERS: I object; my objection to the notice is that the papers called for by it are privileged communications which I have no right to produce.

Mr. FERGUSSON: I am trying to prove a date.

By the COURT: The date it seems to me is a fact, a confidential fact between counsel and client, as client has asked the advice of counsel on the question of law involved.

Argument.

By Mr. FERGUSSON: I give up the idea of privileged communication.

Mr. FERGUSSON: I will make the record.

Mr. CHILDERS recalled by Mr. Fergusson.

Q. Do you remember the date of the first letter that you received from Mr. Dye requesting you to investigate the legality and suffi-

ciency of the proceedings in the attachment suit referred to in the evidence in this case pending in Lincoln County, New Mexico, in the year 1898 and '99, wherein Jones Taliaferro was plaintiff and Benjamin H. Dye was defendant?

A. I do not; in explanation of that answer I will say that I have not been able to find the letters which Mr. Dye wrote to me; they are not in the files where they should be and how they came misplaced I do not know. I will further add, however, that my letter book would refresh my recollection by the answers of the letter; but as I consider a letter written to me by any and every client about his business, any facts communicated to me, dates or anything
312 else as privileged communications, which every lawyer is in honor bound to treat as such, I avail myself of that objection.

Q. I do not require you to state any communication or expect it in response to this question. State whether or not you remember the date of your first answer to Mr. Dye in reply to such letter as I just described?

A. I would not undertake to give it without looking at my letter book; my communication is dictated to a stenographer; my correspondence is dictated to a stenographer sometimes signed by me, my name signed to it, sometimes by myself and sometimes by by stenographer.

Q. Did you not——?

A. But I have no doubt that that letter would show the date because the dates, the leters show the name and the date of the letter to which it is a reply.

Q. State whether or not you didn't receive a written notice from me——

Mr. Childers objects to that question.

Q. In your office in Albuquerque on June 15th of this year requesting you——

Mr. Childers objects to the gentleman stating the contents of the notice upon the ground that it has been shown to me and further objection to the admission of notice in evidence and I have stated that my name is signed to that notice acknowledging the receipt of it and that I did receive such notice.

Q. State whether or not it was not dated at your office where your correspondence is and where your letter files are?

A. Yes, sir; and I looked for the letters with the intention of bringing the letters which Mr. Dye wrote me if I could find them; I did not find the letters, but I have my letter book here in the court house with me for the purpose of producing it if the court should
313 hold that communications between Mr. Dye and myself are proper matters to go to the jury and proper matters of evidence in this case.

By Mr. FERGUSSON: I disclaim any desire to inspect or pry into any fact stated either in Mr. Dye's letter to you or yours to him; I asked you to look at that letter book and refresh your recollection and state the date of your first reply or of your reply to his first letter.

Mr. CHILDERS: I object to that question upon the ground that I cannot be controlled or directed or advised or receive as advice from counsel on the other side his disclaiming or his interpretation of what is proper for me to do in the premises; it must be directed solely by the court. That is an objection not an answer.

By the COURT: I cannot rule on it at present, I will have to have some references.

By Mr. FERGUSSON: I would like to make my record complete.

Ruling on the objection reserved.

Exception.

Witness withdrawn for the time.

Mr. B. H. DYE being first duly sworn according to law, upon his oath testified as follows, to-wit:

Examined by Mr. FERGUSSON:

Q. You are one of the plaintiffs in this case are you not?

A. Yes, sir.

Q. Do you remember the date of the first letter you wrote Mr. Childers, submitting to him the question of the regularity or the validity or sufficiency of the attachments proceedings in a case pending in 1898 and 1899 in Lincoln County, New Mexico, in which Jones Taliaferro was plaintiff and you were defendant and
314 under which proceedings your interest in the Compromise mine was sold?

Mr. CHILDERS: Object to the question upon the ground that the communications from client to attorney are just as much privileged communications as the communications from the attorney to the client.

By the COURT: If you don't show me some authority I will overrule the objection.

Argument.

Q. Well, did you begin to investigate the legality of this attachment proceeding?

A. Yes, sir.

Q. Well, when did you begin?

——: I am not objecting to that.

By the COURT: How did you begin to investigate that is what this examination means; among other things an investigation of this, he wrote a letter to Mr. Childers; now when did he write it is all the examination, not what was in the letter or what occurred between you in an official relation; what did he do and when did he begin to investigate the legality of the attachment suit; that is what I understand the whole examination to be.

Objection overruled.

Exception.

Q. Do you remember the date of the first letter you wrote Mr. Childers submitting to him the question of the regularity or validity

or sufficiency of the attachment proceedings in a case pending in 1898 and '99 in Lincoln County, New Mexico, in which Jones Taliaferro was plaintiff and you were defendant and under which proceeding your interest in the Compromise mine was sold; the question is simply do you remember the date?

A. I do not.

315 · Q. Do you remember the date of any reply that Mr. Childers made to you?

Object to that question as privileged.
Overruled.
Plaintiff excepts.

A. Approximately I think I do.

Q. Can you remember it exactly?

A. Well, sir, to answer that question I will have to refer you to the record; we went over that question in this record, and if it does not now so appear it is the fault of the record.

Q. The question is do you remember now the date?

A. Well, I have answered that question; I do not remember it accurately; approximately I do.

Q. Well, what is approximately?

A. I think it was—I think it was in the first days of December, 18th; well, it was in the first days in December previous to the bringing of this suit, bringing of the original suit, yes, sir, this suit.

Q. The question I am asking you, do you remember the date of the letter that Mr. Childers wrote to you in answer to your first letter to him suggesting the inquiry?

A. I remember the letter very well.

Q. I don't want anything about the letter, do you remember the date?

A. The best information I have upon that subject I gave two years ago, or three years ago, when this case was tried and I think the record will show it and that information was at that time more fresh in my mind than it is now.

Q. But you are not answering my question; do you at this moment now remember the date of the letter Mr. Childers wrote to you in reply to your first letter to him suggesting this inquiry into that suit?

A. No, sir.

316 Q. Have you seen his letter copy book that he has in court here as he testified today?

A. I have seen a book in his telescope there since I came here that apparently is a copy book; I am somewhat familiar with copy books, I never thought what it was.

Q. You did not look to see the date of this letter?

A. I have never had hold of it, neither have I looked into it nor has the date of it been mentioned to me.

Q. Will you release Mr. Childers from his professional obligation and allow him to testify as to this date and no further?

Object to that question as improper; that is a matter not to be illicited by questions upon the witness stand when the client is a

witness—that between client and attorney in their own private consultation to each other. I object to this procedure. I had no objection to dis-losing the date, I object in this kind of way to do this sort of thing; I purpose to ask the permission of the client to take my letter book and testify to those dates.

By the COURT: I don't think the question in this form with the client upon the witness stand and his counsel down here is a proper proceeding.

Mr. FERGUSSON: I submit to your honor's ruling.

Q. Will you after you leave the stand tonight inspect that letter copy book for the purpose of refreshing your recollection as to that date and testify tomorrow?

Objected to; I would like to know how a witness could refresh his recollection by somebody else's letter book between the covers of which he has never looked.

Objection to that question sustained.

Exception.

Witness withdrawn.

Mr. CHILDERS recalled by Mr. Fergusson.

317 Q. Have you found the copy in your letter book of the letter which you wrote to Mr. B. H. Dye in reply to the letter which he wrote you mentioned by me in the first question?

A. I have. The letter which I find your question, the question asked me was the letter written by me; I would not be positive that it is signed by me, it was written with my knowledge, I have no doubt, and while the signature, my name may have been written by Mr. Medler it—he has a signature that so resembles mine that sometimes I cannot tell it.

Q. What is the date?

A. November 28th, and is acknowledged receipt of letter from Mr. Dye dated the 20th of November; but I think I should state in this connection that it simply acknowledges the receipt of a letter and that on December 1st -he next letter was written to Mr. Dye in which it is stated that the papers had been received from the clerk here at Socorro, and an opinion was given to him in that letter.

Q. State whether this is the first letter you wrote to Mr. Dye on this subject.

A. Which do you refer the first letter, the letter dated the 28th of November.

Q. I want to know if that is the first letter?

A. I have referred to two letters, one the 28th of November and December the 1st, the letter of December——

Q. I am not confining mys-lf to those two letters, but is the first one under date there the first letter you ever wrote to Mr. Dye on the subject of bringing this suit?

A. Yes, sir; the letter of November 28th was written in asknowl-

edgment of the first letter ever received from Mr. Dye addressed to me on the subject of the Compromise mine and that letter, the receipt of which is acknowledged by the letter of November 28th, was the first communication ever received from Mr. Dye, either in writing or any other way on that subject.

Q. What year is that there?

318 A. The letter press impression of the letter doesn't bear the date and the year except the last figure, the zero.

Q. What is that?

A. It is the last figure in the calendar year therefore, and was immediately before this suit was brought; if I remember right the suit was brought in 1891, 1901, that letter bears date November 28th, A. D. 1900, and I guess the letter shows the year it was kept, the letter book shows copy of letters, W. B. Childers, attorney at law, from August 1st, 1900, to February 14th, 1901.

Q. State and say with reference to the letter that you wrote to the clerk for the papers, if you wrote such a letter, that was mentioned in this notice to you?

A. The letter that I wrote to the clerk for the papers, I have looked at the letter that was written to the clerk.

Q. That was mentioned in the notice I served on you; I desire to have the date?

A. It was between November 28th, date upon which receipt of that letter *know whether I can find it or not; who was clerk of*

Q. Will you please find the letter?

A. I don't know whether I can find it or not; who was clerk of the court at that time; I don't understand that comes in the case what I am doing with the clerk in the court and what I did has anything to do with the matter. I haven't any objection except to this procedure.

Q. This is a different letter?

—. I am questioning the procedure and proper treatment that I am receiving in being asked to do this thing, not that I care anything about the letters themselves.

By the COURT: The question is objectionable; this is one of the acts which the attorney did and it is not the business of the other side to know what he did in the interest of his client.

319 By Mr. CHILDERS: I desire to answer that question; he wants to know when I wrote for those papers. It was on December 1st that the letter was written to the clerk of the Court at Socorro asking him to send me the papers in that case, together with a memorandum of the docket entries two days after the receipt of Mr. Dye's letter was acknowledged.

That is all.

Mr. JONES TALIAFERRO, a witness called, being first duly sworn according to law, upon his oath testified as follows, to-wit:

Examination by Mr. FERGUSSON:

Q. Mr. Taliaferro, you are one of the defendants in this case?
A. Yes, sir.
Q. Were you in court when Mr. Dye testified, when this case was tried before in Socorro?
A. Yes, sir.
Q. What, if anything, did you hear him say in response to the question when he was on the stand as a witness as to when he returned to White Oaks after his long absence?

Objected to, not the best evidence what he testified to; there was certify record made out by the stenographer and a bill of exception that was certified by the court as a full transcript of the evidence in this case.

It is not an attempt to contradict a-ything. I want to show the date when he returned to White Oaks as an admission.

You have the privilege of reading this record.

Objection sustained.

Exception.

Portion of Mr. Dye's evidence read by Mr. Fergusson.

320 Q. Then you had been absent the whole of the year 1898?
A. Yes, sir.

I am offering now what appears in this transcript, that part of Mr. Dye's testimony which I wish to use on that point.

Q. When did you return to the territory after February, 1898?
A. In the latter part of April, about the 27th or 28th or 29th of April, 1899.
Q. Did you do any assessment work or annual labor or improvements on the Compromise mine in 1899, and if not why?

Withdrawn.

That is direct: I want to read from cross examination; I read that inadvertently.

By Mr. CHILDERS: I will have to correct the statement I made about the letter to the clerk; I said that was the letter asking to send me papers; it is a letter thanking him for the papers and asking him to send memorandum of docket entry; I see no letter asking him to send the papers to me; the letter December first, which was writt-n on the same day that the second letter was written to Mr. Dye stating that I desired to thank him for so kindly sending me papers in the case of Jones Taliaferro *vs.* Benjamin Dye being sent so promptly; I stated inadvertently without looking at it, further mentioning that this letter was written requesting Mr. Griffith to send me papers, which is a mistake; there is a letter thanking him for having sent the papers so promptly. There is no letter in the book asking him to send papers. I may have telegraphed for them.

By Mr. FERGUSSON: I withdraw the part of Mr. Dye's testimony

I read before inadvertently, having read it in direct examination when I wanted *it* to read it in cross examination, where the point is brought out which I wish to offer in evidence.

321

Q. You say you returned to White Oaks on the 27th or 28th of April?

A. Along about that time; I left Denver on the 22d.

Q. If the hotel register at White Oaks shows you registered there on the 22d of April, then would you be certain that it was on the 28th or 29th?

A. If the record should show that *when* I have made a mistake as to the date when I started, or the date when I arrived.

My impression is that I left on the 21st, now it may be that I am in error on that. I never looked to see.

By Mr. FERGUSSON: That is all I want to offer.

Defendant rests.

Court in recess until 9 o'clock.

By Mr. FERGUSSON: I ask permission to introduce a little further testimony of Mr. Dye from the printed record before closing my case.

Q. You say your business has been principally mining?

A. Yes, sir.

Q. You are a regular enrolled member of the bar of this district and territory, are you not?

A. Yes, sir.

Q. How long have you been such?

A. In this district?

Q. Yes, sir.

A. Well, in the district of which Lincoln County was a part I think it was in the fall of 1883.

Q. How long had you been a practicing lawyer before that time?

A. I think I began practicing law in 1864.

Q. Since you were admitted in New Mexico to practice law in Lincoln County, in this district, you have been engaged in the practice, haven't you?

A. Considerable, yes, sir.

Q. Did you do any assessment work or annual labor or improvements on the Compromise mine in 1899, and if not, why?

322

A. I did not. For the reason that I ascertained that in my absence the property had been sold; levied upon and sold—reported to be—and others were in possession of it.

Q. Who did you understand to be in possession of it at that time when you returned in 1899?

A. Mr. Jones Taliaferro.

Q. Did you ever have any conversation with him about it?

Objected to it and moved to strike out as immaterial and irrelevant.

Objection overruled.

Exception.

A. I think not. I expected on several occasions a conversation with him on the subject, but I don't think he ever mentioned it, and I avoided it. That is the impression I have—that we had no communication upon the subject.

Q. You say that the reason you didn't do your assessment work in 1899 on this Compromise claim in controversy in this case, for 1899, was because you found Mr. Jones Taliaferro in possession, as reported to you, under this sale of your property at judicial sale?

A. Yes, sir.

Q. Did you offer to do the assessment work that year?

Objected to as irrelevant and immaterial.
Objection overruled.
Exception.

A. No, sir.

Q. Did you attempt to do it by going on to the property for that purpose?

323 Objected to as immaterial and irrelevant.
Overruled.
Exception.

A. No, sir.

Q. Do you know under whom Heiniman entered into possession?

A. I judge I do.

Q. Well, do you know from conversation with the parties?

A. Oh, yes; from conversation with the parties. Mr. Heiniman told me that he held possession there under a bond and lease subsequently by purchase from Mr. Taliaferro.

Q. Did Heiniman have any partner in his bond and lease to which you have referred, if you know?

A. Yes, I think Mr. Crary told me he was partner with him.

Q. Do you know when Heiniman and Crary entered into possession of this property—actual possession?

A. I know about but I do not know the date.

Q. Well, about when did they first enter into possession?

A. It was in the summer of 1900; I guess; I think so.

Recross-examination by Mr. FERGUSSON:

Q. You learned that from conversation with them, did you?

A. Conversations at various times with Mr. Heiniman and Crary.

Q. They went in possession first, as they told you, under a bond and lease?

A. I think they so represented. My information may be mixed up now with what I saw in the record afterwards, but I think they so represented.

Q. Were you, at the time they entered into possession, in the summer of 1900, were you where you could see them occasionally
324 in possession? Could you ever see them in possession about that time?

A. I saw them in possession over there, yes, during the summer.

Q. How did you happen to see them in possession in the summer of 1900?

A. I heard that they were there, and I went to verify it, heard that they had made a valuable *disclosure* of ore, and went to see.

Q. And found them in possession, working this valuable discovery?

A. No, they weren't working the valuable discovery when I first went there. The discovery hadn't yet been made in the tunnel where I found them at work.

Q. You say they went into actual possession of it under that bond and lease in the summer of 1900? Wasn't it May, 1900.

A. I don't know; it may have been. I have learned, found out, that they had been in possession and done considerable work before ever I knew anything about it. I don't know when they went into possession.

Q. You are speaking of your own personal knowledge?

A. Yes, sir.

Q. That was the summer of 1900?

A. I think so; yes.

Q. Were you working near there in the summer of 1900?

A. Yes; about a quarter of a mile.

Q. You could see the claim where they were working from the claim where you were working?

A. Sections of it. I could not see where they were at work.

Q. When did you resume work on your claim that year? That was within a quarter of a mile of their's—of the Lady Godiva.

—. ——.

Q. When did you begin work on the Lady Godiva that year; if that year?

325 A. I think it was in the spring; I would not undertake to say what month now, without reference to the books.

Q. After they made that rich strike did you go there frequently or not?

A. Yes, I passed there frequently.

Q. Have any conversation with them?

A. Yes, sir.

Q. Did you ever ride up and down with them between White Oaks and the work, morning and evenings?

A. Yes; I rode with Mr. Heiniman and Crary, twice, I think, from the Boston Boy to town.

Q. And you learned from them—excuse me, I *I* thought you were through.

A. And I may have ridden with them once or twice more, but not frequently.

Q. When they were going to and from work there?

A. Yes, sir.

Q. And you were working near there?

A. We were a quarter of a mile apart. But went up and down the same road to town.

Q. But it was in conversation between these rides, back and forth, and when you would visit the strike up at the mine, that you learned,

as I understand you, that they were in possession of that claim and working it, under a bond and lease, that is, a purchase bond from Jones Taliaferro, who purchased it at the judicial sale made against you. That is when you got the information, by conversations as to the right they had to be on the claim?

A. I didn't contest their right on the claim. They were there talking.

Q. I just asked you if it was during these various talks on the claim and riding with them that you learned that they were working it under a bond and lease from Jones Taliaferro, after you
326 got back, when you learned that Jones Taliaferro had bought it at this sale. That is when you got that information?

A. Yes, sir; I couldn't designate any time or place when they first notified me, that is, gave me notice; you understand it; somebody told me as a fact where they were at work, and how—a friendly talk.

Witness excused.

Q. And what did you say about wishing them success and hoping that it would prove to be a good mine, and that if it did it would benefit you because you owned an interest in the Little Nell, just north of it?

A. At that time and long before Mr. Heiniman and Crary knew all about the relations of the Little Nell and the Compromise, knew that I was connected with the Little Nell; we had talked about that fact, they had told me about the prospecting of the Little Nell, and had full information about all the relations existing there, and no conversation of that character was had at that time. None whatever; and for either of us to have had any conversation at that time on those subjects would have been entirely superfluous.

Q. I am asking you what was said about those things to which I have directed your attention, Mr. Dye. The Little Nell was one of them and the other one was about your claim to the Compromise?

A. Nothing was said.

Q. What was said about wishing him success?

A. Oh, that is possible. I wish everybody success, just the same as I wish everybody good morning and evening.

Q. What did you say about hoping he would make a mine out of it?

A. I have no knowledge of any such remark.

Q. State whether or not you ever had any other conversa-
327 tion with Mr. Heiniman in which any such thing was said with reference to your interest in the Compromise?

A. I suppose so. I have no doubt it is true that I have told Mr. Heiniman in various conversations that we have had upon all manners of subjects that I had at one time owned five-sixths of the Compromise mine. I have no doubt that I have told him, as I have told anybody else who made it their business to make inquiries of me, that fact.

Q. What fact?

A. That I had been the owner of five-sixths of the Compromise

mine, and that I was sold out under attachment in my absence from the territory.

Q. What time did you learn of this sale of your property under that attachment proceeding?

A. Immediately upon my return to White Oaks.

Move to strike out that part of the evidence relative to a notice in the newspaper and the question upon the ground wholly as irrelevant and immaterial; the only notice ever shown to have been printed was an attachment in this case is in evidence and was published before the pretended writ of attachment on this mine and because the defendant was not obliged to take notice of any publication of a void attachment.

Overruled.

Plaintiff excepts.

Q. Did you examine the papers to see if it was regular?

A. No, sir.

Q. Were you surprised that your property had been sold?

A. I don't know that I can say I was surprised, but I was very much annoyed, I knew that proceedings had been taken to divest me of everything that could be reached, my law office and my books and my library and everything was gone.

328 Q. You knew that while you were gone?

A. No, I knew there were proceedings in that direction.

Q. Knew it while you were gone.

A. That proceedings had been taken, particularly with reference to my law office, yes, sir.

Q. How did you get that information?

—. ——.

Q. How did you get the information that proceedings or something of the kind had been started to deprive you of all you had?

A. I think it is fair that I should modify that answer, if I answered just that way. I want to modify that answer to this effect, that I had noticed from the newspaper clipping or a marked newspaper containing notice that proceedings had been instituted in the justice's court to recover the office rents, rent for the building, and what other information was connected therewith I disremember, but I inferred from that that my creditors were in motion.

Q. From whom did you get that information or newspaper clipping?

A. I don't know who sent that to me. I don't know at this time whether it was in a letter or whether it was a marked item in a newspaper. If it was in a letter, then it would be a newspaper clipping. Whether it was sent by the court or some other person I don't know.

Q. When you got back in April and learned that your property, this Compromise mine, had been attached and sold, what did you do about it?

Objected to upon the same ground; under no obligation to do anything.

Overruled.

Exception.

Q. What did you do about it?
A. Nothing.
Q. Nothing?
A. Nothing.
Q. Did you make no inquiries about the character of the
329 proceedings that had been had against you?
A. No, sir.

Same objection.
Overruled.
Plaintiff excepts.

Q. Didn't you examine the papers during that year of 1899?

Same objection.
Same ruling.
Exception.

A. No, sir; never have examined the papers up to today.
Q. When did you get the information on which you brought this suit?
A. On the 4th day of December, 1900.
Q. What led you to make inquiry or examination that resulted in your getting that information on the 4th day of December, 1900?
A. I think I can completely answer that by stating that it was the result of my own mental operations.
Q. Were those mental operations about these; that now these men have made this mine worth fifty thousand dollars, and I will go now and see if I can pick a flaw in that attachment case? Were those the mental operations?
A. No, sir.

Objected to as irrelevant, immaterial and incompetent.
Objection overruled.
Exception.

Q. What were they, then?
A. Well, I can explain that to my satisfaction; possibly to yours. You ask what they were?
Q. What were these mental operations that led you to make that examination on December 4, 1900?
330 A. They weren't made on December 4th.
Q. I beg your pardon; when were they made, then?
A. I thought you said so. *A.* Previous to that. That is the time I got information that induced me to act.
Q. How did you get that information?
A. I got that information in the shape of an opinion from my attorney that I had previously requested—by letter received on the 4th day of December, 1900.
Q. Who was that attorney?
A. Mr. W. B. Childers.
Q. When did you submit the case to him?
A. Well, I couldn't tell; a good many days before. Probably as much as two weeks before.

Q. Did you send him the papers in the attachment case, for his examination and opinion?

A. No, sir.

Q. What did you do?

A. Nothing but write him for an opinion.

Q. What led you—What were the mental operations that led you to write the letter submitting it to him for an opinion?

A. Well, previous to my going away there was a law in force in New Mexico relative to attachment proceedings requiring that advertisement should be made in both languages. In certain cases, I presume. I had lost trace of that statute, as to whether it was still in force or not, during my absence, and never having seen this advertisement in this Compromise case, I did not know whether it had been advertised in both languages or not, but I was somewhat anxious to find out. That was one point.

Q. What other?

A. Another was that I had observed what I thought to be a looseness of practice on the part of the attorney who had brought that suit. Then I was aroused by an interview appearing in the local
331 paper there, copied from an El Paso paper, purporting to be an interview with Mr. Jones Taliaferro, the contents of which stunned me, and I became aroused about it.

Q. What time is that? When did you read that interview give the date.

A. Oh, it was along in the fall, I should say, of 1900. I could not assign the date.

Q. Was it October?

A. I couldn't assign the month.

Q. You heard Mr. Taliaferro's testimony, didn't you?

A. I heard his testimony; yes, sir.

Q. That it was the first days of October?

A. I could not dispute Mr. Jones Taliaferro's testimony about that; he had opportunity to know, and I haven't. Well, sir; reflecting upon these things it occurred to me that it was my duty to myself to make inquiry as to the binding effect of the proceedings in that case. I made up my mind to do it, and did it by writing to Mr. Childers, and on the 4th of December I got his answer giving his opinion that I hadn't been divested of my title, and right there, without arising from my desk, I wrote him a letter giving instructions for the bringing of this suit.

Q. It was on the strength of that this suit was brought?

A. Yes, sir.

Q. Now, Mr. Dye, you stated that the first point was your recollection that notice by publication had to be in both languages, and that your next point in your mental operations was a circumstance that you observed which suggested that the attorney for Mr. Taliaferro in the attachment proceedings was given sometimes to looseness in his law practice?

A. Had observed or heard, I said.

Q. How did you know that that attorney had been Mr.
332 Taliaferro's attorney in that attachment proceedings?

A. I expect I learned that as a piece of definite information from Mr. Wharton himself.

Q. When?

A. I suppose it was shortly after my return. I went to Mr. Wharton for information relative to my law office, library, books and papers, to see what he knew about it, and I suppose we discussed the matter quite fully. At least I knew either from him or others that he had acted as the attorney.

Q. When did you learn of these circumstances that suggested his looseness of methods?

A. Well, to answer that, Mr. Fergusson, it involves private conversations had with other attorneys.

Q. I excuse you from giving those; but tell me when, the question is, that you learned the circumstances, without telling what the conversations were?

A. Well, previous to the time that I made inquiry of Mr. Childers, and previous to the time that I got to reflecting upon this subject.

Q. Was it previous to the time that you were aroused by this interview of Jones Taliaferro?

A. I could not say whether it was then or subsequent; I don't hesitate to speak out the attorney's name if you want it.

Q. I don't ask you for that; it is not necessary for my purpose, if it is not for yours?

A. I don't care to mention it.

Q. Well, we will drop it then. Was that learning of that circumstance of looseness in his methods that set you to thinking? When did you get that information?

A. Shortly previous to the time that I wrote for an opinion.

Q. Was it about the time you read that interview that made you angry?

A. I suppose so, I judge so.

333 Q. When did you remember about this law requiring publications to be in both languages; was that about the same time?

A. No.

Q. When was that?

A. Oh, that was a year or more before I went away.

Q. You don't understand my question. When did you remember that law, or that there had been such a law, in your mental cogitations that resulted in your writing Mr. Childers—how long before?

A. Well, it was along about this same time, when I began to think about these things.

Q. That was about the time Mr. Taliaferro, or just about the time Mr. Taliaferro, gave that interview in El Paso?

A. Yes, when I was talking about the thing; when I thought it was an evident purpose to offer me an insult in an indirect way.

Q. You have already testified you were a practicing lawyer in New Mexico for eighteen years?

A. I have been a member of the bar; I haven't practiced law possibly for the past ten years, except casually.

Q. Mr. Dye, I would like to ask you this question: Did any of those mental movements of yours that resulted in your submitting this case to Mr. Childers for an opinion occur to you before the discovery of the rich ore?

A. I think not.

Q. They all occurred to you after the rich ore was discovered?

A. I suppose in time; yes, sir.

Q. I want you to be positive about that?

A. Yes, sir; it required a considerable time afterwards.

Q. Well, about how long afterwards before you began to think on those points?

A. Oh, a month or so, probably; the discovery was made, according to testimony here, I think in August. In November I made up my mind to ask for an opinion, and did so.

334 Q. And those mental meditations had all occurred in the meantime?

A. Yes, sir.

Mr. Childers offers in rebuttal the following:

Mr. Childers reads in evidence the testimony of Mr. Dye.

BENJAMIN H. DYE, called on behalf of plaintiffs, having been first duly sworn, testified as follows:

Direct examination by Mr. CHILDERS:

Q. State your name?

A. Benjamin H. Dye.

Q. Where do you reside, Mr. Dye?

A. White Oaks, New Mexico.

Q. What is your business?

A. Principally that of mining.

Q. How long have you resided at White Oaks, New Mexico?

A. Since the 6th of June, 1883. That is the time I arrived there to take up my residence. I had been there a year before, but that was the time I went to take up my residence.

Q. What has been your business since you have been there?

A. Practicing law and mining.

Q. What has been your principal business?

A. Mining.

Q. I will ask you to look at the paper which is shown you, and state if you know what has become of the original of that paper?

A. I think I can explain what has become of the original of this paper; yes, sir.

Q. Well, sir, I asked you that?

A. Shall I explain?

Q. Yes, sir?

A. The original of this paper was in my possession for many years, and was in my possession—I think it was—in the month

335 of August, 1897, in my office in White Oaks. During that month I left White Oaks for to look after some business in

the state of Colorado. Being at that time in rather impaired or feeble health, I got to Colorado and was taken sick——

Q. I simply want to know what became of that paper; I don't care about the other matters?

A. I have explained all I could explain as preliminary.

Q. Well, where was the paper?

A. I was unable to get back, and was gone for about eighteen months, I think. In that time the landlady and landlord who owned this office in which this paper was situated brought a little proceeding for collection of rents, got into the office and attached or levied upon under a landlord's lien my books and furniture, and sold them, and then let into this building that I occupied as office some people that got——

Q. Do you know where the original is?

A. It disappeared under those circumstances.

Q. You don't know where it is, do you?

A. No, sir.

(By Mr. FERGUSON:)

Q. This relates to the Compromise mine that is in controversy, does it, Mr. Dye?

A. Yes, sir.

Mr. CHILDERS: I will offer this copy in evidence, marked "Plaintiff's Exhibit A."

(Read to the jury, with the following explanation by)

Mr. CHILDERS: This is a certified copy of the location notice, and the record shows it was filed for record May 9, 1887, and recorded by Jones Taliaferro, recorder. That is the foundation of the claim—the beginning of the title.

336 "PLAINTIFF'S EXHIBIT A."

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Know all men by these presents, that we, the undersigned citizens of the United States, above the age of twenty-one years, have this 21st day of April, A. D. 1887, claimed by right of discovery and location and do hereby claim by virtue of such right one thousand one hundred and seventy and two-tenths feet linear and horizontal measurement in length and two hundred feet in width on the east side of the middle of the vein on this lode and three hundred feet in width on the west side of the middle of the vein on this lode along the course of the same, with all its spurs, dips, variations and angles, together with the amount of surface ground as above claimed and described.

This said lode, vein, ledge or deposit hereby located and claimed as aforesaid is situated on the westerly slope of Baxter mountain and the westerly side of Baxter gulch of said mountain in White Oaks mining district, Lincoln County, Territory of New Mexico, and is more particularly bounded and described as follows, to-wit:

Commencing at the discovery and location monument, whence southwest corner "Little Nell" lode claim as officially established bears north 56 degrees 30 minutes east, 125 feet distant, thence north 1 degree 40 minutes west, 155 7/10 feet to the north end center monument, thence north 82 degrees west, 200 feet to the south end center monument, and 500 feet to the southwest corner, thence north 1 degree 40 minutes west, 1170 2/10 feet to the northwest corner, thence 82 degrees east 300 feet to the north end center, the point of beginning. The name of said vein, lodge, ledge or de-
337 posit, so located, is the Compromise Mining Claim or Lode. Discovered February 1st, 1887. Located April 21st, A. D. 1887.

BENJAMIN H. DYE,
JOHN D. COCKRELL,
THEO. W. HEMAN,
Locators One-third Each.

(Witnesses:)
D. J. M. A. JEWETT.
ED. SCHAFFER.
JOHN K. BYERS.

I hereby certify that since the 21st day of April, A. D. 1887, the date of the above and foregoing miner location, I have given an open cut and tunnel on said claim, exposing mineral in place more than ten feet below the surface.

B. H. DYE.

White Oaks, N. M., May 9th, 1887.

Filed May 9th, 1887, 3:30 p. m. Recorded May 9th, 1887.
JONES TALIAFERRO, *Recorder,*
By W. J. TALIAFERRO, *Deputy.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, George Curry, probate clerk and *ex-officio* recorder in and for Lincoln County, New Mexico, do hereby certify that the above is a true and correct copy of Location Notice of the Compromise Mining Claim as appears in Mining Record Book "O," pages 450 and 451.
338 In witness whereof I have hereunto set my hand and affixed my official seal this 4th day of August, A. D. 1890.

GEORGE CURRY,
Probate Clerk,
By M. A. SISNEROS, *Deputy.*

Cross-examination by Mr. FERGUSSON:

Q. You say your business has been principally mining?
A. Yes, sir.
Q. You are a regularly enrolled member of the bar of this district and territory, are you not?
A. Yes, sir.

Q. How long have you been such?
A. In this district?
Q. Yes, sir?
A. Well, in the district of which Lincoln county was a part, I think it was in the fall of 1883.
Q. How long had you been a practising lawyer before that time?
A. I think I began practicing law in 1864.
Q. Since you were admitted in New Mexico to practise law in Lincoln County, in this district, you have been engaged in the practice, haven't you?
A. Considerable; yes, sir.

Witness excused.

BENJAMIN H. DYE, recalled on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CHILDERS:

Q. I will ask you to state where you were in February, 1899?
A. I was in Denver, Colorado.
339 Q. When had you last been in the Territory of New Mexico previous to that time?
A. Previous to that date?
Q. Yes.
A. It was in the month of August, and I think in the latter part of August, 1897.
Q. 1897?
A. 1897; yes, sir.
Q. I am asking you about February, 1899?
A. Then I misunderstood you.
Q. I am asking you when you left the territory with reference to the month of February, 1899?
A. In August, 1897.
Q. Then you had been absent the whole of the year 1898?
A. Yes, sir.
Q. When did you return to the territory after February, 1899?
A. In the latter part of April, about the 27th or 28th or 29th of April, 1899.
Q. Did you do any assessment work or annual labor or improvements on the Compromise mine in 1899, and if not, why?
A. I did not. For the reason that I ascertained that in my absence the property had been sold; levied upon and sold—reported to be—and others were in possession of it.
Q. Who did you understand to be in possession of it at that time when you returned in 1899?
A. Mr. Jones Taliaferro.
Q. Did you ever have any conversation with him about it?
A. I think not. I expected on several occasions a conversation with him on the subject, but I don't think he ever mentioned it, and I avoided it. That is the impression I have—that we had no communication upon the subject.
Q. And your reason for not doing the assessment work in 1899

was that the property was—what did you say your reason was for not doing the assessment work in 1899?

340 A. It was that I found it in possession of Mr. Taliaferro; adverse possession, as I assumed, inasmuch as there had been a levy and a sale.

Cross-examination by Mr. FERGUSSON:

Q. You say you returned to White Oaks on the 27th or 28th of April?

A. Along about that time; I left Denver on the 22d.

Q. If the hotel register at White Oaks shows you registered there on the 22d of April, then would you be certain that it was on the 28th or 29th?

A. If the record should show that, then I have made a mistake as to the date when I started, or the date when I arrived. My impression is that I left on the 21st, now it may be that I am in error on that, I never looked to see.

Q. You say that the reason that you didn't do your assessment work in 1899 on this Compromise claim in controversy in this case, for 1899, was because you found Mr. Jones Taliaferro in possession, as reported to you, under this sale of your property at judicial sale?

A. Yes, sir.

Q. Did you offer to do the assessment work that year?

A. No, sir.

Q. Did you attempt to do it by going on to the property for that purpose?

A. No, sir.

Redirect examination by Mr. CHILDERS:

Q. State whether or not you subsequently made any attempt to do any assessment work on it?

A. I did.

Q. When?

A. In June of 1901.

Q. Well, state whether you were permitted to do it or not?

A. I did make an attempt, in June, 1901.

Q. Well, what was the result of the attempt?

341 A. Well, not only the man that I had put to work there was threatened, as I was informed, and as one of the defendants testified——

Q. I will ask you if you subsequently—if you paid a man to work there, and he did not do the work?

A. Yes, sir.

Q. Did you have any conversation with any of the defendants in this case about that afterwards?

A. Yes, sir.

Q. Who was that defendant?

A. Mr. Heiniman.

Q. What was that conversation?

A. Well, he told me that he would not permit me or any one

else to do work on that claim and that any one that attempted it would be met with violence.

Plaintiff omitted reading the following testimony, as it had already been read by the defendant.

Q. Do you know under whom Heiniman entered into possession?
A. I judge I do.
Q. Well, do you know from conversation with the parties?
A. Oh, yes; from conversation with the parties. Mr. Heiniman told me that he held possession there under a bond and lease and subsequently by purchase from Mr. Taliaferro.
Q. Did Heiniman have any partner in his bond and lease to which you have referred, if you know?
A. Yes, I think Mr. Crary told me he was a partner with him.
Q. Do you know when Heiniman and Crary entered into possession of this property—actual possession?
A. Not actual. I know about, but I do not know the date.
Q. Well, about when did they first enter into possession?
A. It was in the summer of 1900, I guess; I think so.

342 Recross-examination by Mr. FERGUSSON:

Q. You learned that from conversation with them, did you?
A. Conversations at various times with Mr. Heiniman and Mr. Crary.
Q. They went in possession first, as they told you, under a bond and lease?
A. I think they so represented. My information may be mixed up now with what I saw in the record afterwards, but I think they so represented.
Q. Were you, at the time they entered into possession, in the summer of 1900, were you where you could see them occasionally in possession? Could you ever see them in possession about that time?
A. I saw them in possession over there, yes, during the summer.
Q. How did you happen to see them in possession in the summer of 1900?
A. I heard that they were there, and I went to verify it; heard that they had made a valuable disclosure of ore, and went to see.
Q. And found them in possession, working this valuable discovery?
A. No, they weren't working this valuable discovery when I first went there. The discovery hadn't been made in the tunnel where I found them at work.
Q. You say they went into actual possession of it under that bond and lease in the summer of 1900? Wasn't it in May, 1900?
A. I don't know; it may have been. I have learned, found out, that they had been in possession and done considerable work before ever I knew anything about it. I don't know when they went into possession.

Q. You are speaking of your own personal knowledge?
A. Yes, sir.
343 Q. That was the summer of 1900?
A. I think so; yes.
Q. Were you working near there in the summer of 1900?
A. Yes, about a quarter of a mile.
Q. You could see the claim where they were working from the claim where you were working?
A. Sections of it. I could not see where they were at work.
Q. When did you resume work on your claim that year? That was within a quarter of a mile of theirs—of the Lady Godiva?
Q. When did you begin work on the Lady Godiva that year; if that year?
A. I think it was in the spring; I would not undertake to say what month now, without reference to the books.
Q. After they made that rich strike did you go there frequently or not?
A. Yes, I passed there frequently.
Q. Have conversation with them?
A. Yes.
Q. Did you ever ride up and down with them between White Oaks and the work, morning and evenings?
A. Yes; I rode with Mr. Heiniman and Crary, twice, I think, from the Boston Boy to town.
Q. And you learned from them—excuse me, I thought you were through?
A. And I may have ridden with them once or twice more, but not frequently.
Q. When they were going to and from work there?
A. Yes, sir.
Q. And you were working near there?
A. We were a quarter of a mile apart. But went up and down the same road to town.
Q. And it was in conversation between these rides, back and forth, and when you would visit the strike up at the mine, that you learned, as I understand you, that they were in possession of
344 that claim and working it, and under a bond and lease, that is, a purchase bond from Jones Taliaferro, who purchased it at the judicial sale made against you. That when you got the information, by conversations, as to the right they had to be on the claim?
A. I didn't contest their right on the claim. They were there talking.
Q. I just asked you if it was during these various talks on the claim and riding with them that you learned they were working it under a bond and lease from Jones Taliaferro, after you got back, when you learned that Jones Taliaferro had bought it at this sale. That is when you got that information?
A. Yes, sir; I couldn't designate any time or place when they first notified me, that is, gave me notice; you understand it; some-

body told me as a fact where they were at work, and how—a friendly talk.

Witness excused.
Plaintiff reads the following:

BENJAMIN H. DYE recalled for further cross-examination by Mr. Fergusson:

Q. You stated that when you got back to White Oaks in April, 1899, you learned of these attachment proceedings for the sale of your property?
A. Yes, sir.
Q. Was that the first information you had of that?
A. Yes, sir.
Q. Do you know of Atwood Littell?
A. Yes.
Q. Had you any correspondence with him while you were away?
A. I think not, you mean, of course, from 1897 to 1899?
Q. April, 1899?
A. No, sir; not to my recollection.
345 Q. Had no correspondence in that time?
A. With Mr. Atwood Littell?
Q. With Mr. Atwood Littell?
A. No.
Q. None?
A. No.
Q. Did you write him a letter in reply to one received by you in which you stated that he need not do the assessment work, or pay the party who had done it, or was doing it, because the claim was not worth it.
—. ——.
Q. What time did you learn of this sale of your property under that attachment proceeding?
A. Immediately upon my return to White Oaks.
Q. Did you examine the papers to see if it was regular?
A. No, sir.
Q. Were you surprised that your property had been sold?
A. I don't know that I can say I was surprised, but I was very much annoyed. I knew that proceedings had been taken to divest me of everything that could be reached, my law office and my books and my library and everything was gone.

By the PLAINTIFF: Then followed examination of papers and the newspaper clippings, which was read by the defendant.

Q. Did you have an agent in White Oaks while you were gone?
A. No.
Q. Left nobody in charge of your property?
A. No.
Q. Was your son-in-law there?
A. No.

Q. Were you in correspondence with anybody while you were away?

A. One gentleman—Mr. Arnold Ridgeway, soon after I went away. Later Mr. Joseph A. Guum.

Q. Those two gentleman?

A. And I had some correspondence with the postmaster about my mail.

Q. Did you write no letters or make any inquiry in any
346 other way during your absence concerning the Compromise mine or the assessment on it?

A. To any other person, you say?

Q. Anybody?

A. I had correspondence with Mr. Thomas C. Johns, who owned one-sixth interest, and I had corresponded with Mr. Joseph A. Gumm relative to the same subject matter.

Then Mr. Fergusson read you what follows:

Q. When you got back in April and learned that your property, this Compromise mine, had been attached and sold, what did you do about it.

Q. What did you do about it?

A. Nothing.

Q. Nothing?

A. Nothing.

Q. Did you make any inquiries about the character of the proceedings that had been against you?

A. No, sir.

Q. Didn't examine the papers during that year of 1899?

A. No, sir; never have examined the papers up to today.

Q. When did you get the information on which you brought this suit?

A. On the 4th day of December, 1900.

Q. What led you to make inquiry or examination that resulted in your getting that information on the 4th day of December, 1900?

A. I think I can completely answer that by stating that it was the result of my own mental operations.

Q. Were those mental operations about these: That now these men have made this mine worth fifty thousand dollars, and I will go now and see if I can pick flaw in that attachment case? Were those the mental operations?

A. No, sir.

Q. What were they, then?

347 A. Well, I can explain that to my satisfaction, possibly to your. You ask what they were?

Q. Were those mental operations that lead you to make that examination on December 4, 1900?

A. They weren't made on December 4th.

Q. I beg your pardon; when were they made, then? I thought you said so.

A. Previous to that. That is the time I got information that induced me to act.

Q. How did you get that information?

A. I got that information in the shape of an opinion from my attorney that I had previously requested—by letter received on the 4th day of December, 1900.

Q. Who was that attorney?

A. Mr. W. B. Childers.

Q. When did you submit the case to him?

A. Well, I could not tell; a good many days before. Probably as much as two weeks before.

Q. Did you send him the papers in the attachment case for his examination and opinion?

A. No, sir.

Q. What did you do?

A. Nothing but write him for an opinion.

Q. Ask him to go and get the papers himself?

—. ——.

Q. What led you—What were the mental operations that led you to write the letter submitting it to him for an opinion?

A. Well, previous to my going away there was a law in force in New Mexico relative to attachment proceedings requiring that advertisement should be made in both languages. In certain cases, I presume. I had lost trace of that statute as to whether it was still in force or not, during my absence, and never having seen this advertisement in this Compromise case, I did not know whether it had been advertised in both languages or not, and I was somewhat anxious to find out. That was one point.

348 Q. What other?

A. Another was that I had observed what I thought to be a looseness of practice on the part of the attorney who had brought that suit. Then I was aroused by an interview appearing in the local paper there, copied from an El Paso paper, purporting to be an interview with Mr. Jones Taliaferro, the contents of which stunned me, and I became aroused about it.

Q. What time is that? When did you read that interview, give the date?

A. Oh, it was along in the fall, I should say, of 1900. I could not assign the date.

Q. Was it October?

A. I couldn't assign the month.

Q. You heard Mr. Taliaferro's testimony, didn't you?

A. I heard his testimony; yes, sir.

Q. That it was the first days of October?

A. I could not dispute Mr. Jones Taliaferro's testimony about that; he has opportunity to know, and I haven't. Well, sir; reflecting upon these things it occurred to me that it was my duty to myself to make inquiry as to the binding effect of the proceedings in that case. I made up my mind to do it, and did it by writing to Mr. Childers, and on the 4th of December I got his answer, giving his opinion that I hadn't been divested of my title, and right there, without arising from my desk, I wrote him a letter giving instructions for the bringing of this suit.

Q. It was on the strength of that this suit was brought?

A. Yes, sir.

Q. Now, Mr. Dye, you stated that the first point was your recollection that notice by publication had to be in both languages, and that your next point in your mental operation was a circumstance that you observed, which suggested that the attorney for Mr.

349 Taliaferro in the attachment proceedings, was given sometimes to looseness in his law practice?

A. Had observed or heard, I said.

Q. How did you know that that attorney had been Mr. Taliaferro's attorney in that attachment proceedings?

A. I expect I learned that as a piece of definite information from Mr. Wharton himself.

Q. When?

A. I suppose it was shortly after my return. I went to Mr. Wharton for information relative to my law office, library, books and papers, to see what he knew about it, and I suppose we discussed the matter quite fully. At least I knew either from him or others that he had acted as the attorney.

Q. When did you learn of these circumstances that suggested his looseness of methods?

A. Well, to answer that, Mr. Fergusson, it involves private conversations had with other attorneys.

Q. I excuse you from giving those; but tell me when, the question is, that you learned the circumstances, without telling what the conversations were?

A. Well, previous to the time that I made inquiry of Mr. Childers, and previous to the time that I got to reflecting upon this subject.

Q. Was it previous to the time that you were aroused by this interview of Jones Taliaferro?

A. I could not say whether it was then or subsequent; I don't hesitate to speak out the attorney's name if you want it.

Q. I don't ask you for that; it is not necessary for my purpose, if it is not for yours.

A. I don't care to mention it.

Q. Well, we will drop it then. Was that learning of that circumstances of looseness in his methods that set you to think-

350 ing? When did you get that information?

A. Shortly previous to the time that I wrote for an opinion.

Q. Was it about the time you read that interview that made you angry?

A. I suppose so, I judge so.

Q. When did you remember about this law requiring publications to be in both languages; was that about the same time?

A. No.

Q. When was that?

A. Oh, that was a year or more before I went away.

Q. You don't understand my question. When did you remember that law, or that there had been such a law, in your mental cogitations that resulted in your writing to Mr. Childers, how long before?

A. Well, it was along about this same time when I began to think about these things.

Q. That was about the time Mr. Taliaferro, or just about the time Mr. Taliaferro, gave that interview in El Paso?

A. Yes, when I was thinking about the thing; when I thought it was an evident purpose to offer me an insult in an indirect way.

Q. You have already testified you were a practising lawyer in New Mexico for eighteen years?

A. I have been a member of the bar; I haven't practised law possibly for the past ten years, except casually.

Q. If you did not offer to redeem this property within a year after its sale to Mr. Taliaferro under that attachment proceeding, why did you not do so?

A. Well, sir, I was of the impression, that seemed to be firmly fixed in my mind, that there was no authority of law for redeeming the real estate sold under execution.

Object to that answer.

By the COURT: It seems to me it reflects upon the further proposition that you have read his testimony, what he knew and
351 what he believed about what his rights were.

Objection overruled.

Defendant excepts.

Q. That is the reason you didn't do it?

A. Yes, sir.

Q. Simply because it had escaped your mind, or you were under the impression that there was no authority of law to redeem this property sold under execution sale?

A. Yes, sir.

Q. It had escaped your mind, also, that the statute of New Mexico permitted you to file a motion in that suit any time within a year after the judgment was rendered, to correct any errors or irregularities, or anything at all that was wrong with it?

A. It has escaped my mind if there is any such law right now.

Q. Mr. Dye, I would like to ask you this question; did any of those mental movements of yours that resulted in your submitting this case to Mr. Childers for an opinion, occur to you before the discovery of the rich ore?

A. I think not.

Q. They all occurred to you after the rich ore was struck?

A. I suppose in time; yes, sir.

Q. I want you to be positive about that?

A. Yes, sir; it required a considerable time afterwards.

Q. Well, about how long afterwards before you began to think on those points?

A. Oh, a month or so, probably; the discovery was made, according to testimony here, I think, in August. In November I made up my mind to ask for an opinion and did so.

Q. And these mental meditations had all occurred in the meantime?

A. Yes, sir.

352 By Mr. CHILDERS:

Q. When did you first know that there was rich ore on that claim, Mr. Dye, with reference to this sale under this attachment? Before or afterwards?

A. I think the testimony here about the discovery made in August was correct, I judge so. And I heard of it very soon afterwards.

Q. I am not asking you about that discovery. I am asking you about any previous knowledge that you may have had previous to that discovery of any rich ore of any kind on that mine?

A. I knew of this rich ore, fine ore, before this location was made.

Q. What was the trouble, if any, with working and developing the mine, so far as sulphide ore was concerned, from the time you located it up to the time that it was sold, or afterwards.

A. There was no trouble in working the mine.

Q. I mean profitably?

A. There was trouble about working the ore. At the time that ore was discovered by me in 1886 or 1887 there was no facilities in White Oaks, or nearer than Socorro, the smelter at Socorro, where such ore could be treated. The cyanide process by which we treat such ores now was not at that time known as a metallurgical process. It was simply a matter of laboratory knowledge at that time.

Q. You say there was a smelter here at Socorro. Do you know when the smelter ceased to operate here at Socorro.

A. I do not. But I say there could have been nothing nearer than Socorro.

Q. After it ceased to work what was the nearest smelter?

A. Either El Paso or Pueblo.

By Mr. FERGUSSON:

Q. If you had made this discovery before so early, what did you mean when you said to McIvers, if you did say so, that you
353 thought the mine had been well sold when Taliaferro took it for attachment?

A. I never made any such statement to Mr. McIvers. I deny that most emphatically.

Q. You do what?

A. I deny that most emphatically.

Witness excused.

B. H. DYE, recalled, testified as follows:

Direct examination by Mr. CHILDERS:

Q. Mr. Dye, you have heard the testimony read here of Mr. E. Heiniman, with reference to the interview with you or conversation on the mine, on the Compromise mine, at the time that Mr. Alexander was engaged at work there some time in the latter part of October. I will ask you to state what the conversation was, as well as you can recall it?

A. I remember that conversation. I could not assign the date of it, but I remember the conversation there at that shaft mentioned

by Mr. Alexander and on the (lead) of the mine when Mr. Heiniman was present, and I think Mr. Crary. It was my custom, I may say generally now, to keep full and accurate trace of all the mining that was going on in the camp, with the view of extending my own information and education, and I *have* frequently went to the Compromise, after they began to mine productively. On this occasion Mr. Heiniman said to me, I being then on the (lead) in general flippant conversation of the hour, you know—you were one of the locators of this mine, were you not. I told him yes. Well, said he, we, or I, have made quite an examination to find out where the monuments of this mine are situated, and particularly where the location monument is or was, and knowing before you stated it
354 that you were the locator, I thought I would ask you to show us all you know about the property. I said, certainly. I then showed him where the location monument originally was, then gone, at the time of this conversation. I showed it to him within two or three feet, and we walked to the place where a survey would establish it. Showed him that the monument was up on the bank just above, and at the edge of the tunnel face, the tunnel face now being caved in, gradually, six inches or a foot every year, the tunnel face had been by this caving pushed considerably further into the hill and by this caving th*t* monument had fallen also. Now we were there in conversation about this particular locality, and Mr. Alexander was working around at the shaft, probably sometimes fifty feet away, sometimes twenty feet away, I don't think at that point his duties would call him up nearer than twenty feet; that was about all that occurred with reference to the monument except I then showed him from the end of the dump, twenty or thirty or forty feet from where we were standing, where the north end center monument of the claim stood; that monument was still standing and was by the survey 170 feet north of the original location monument. I showed him there from the dump, something like 100 or 125 feet distant from where we stood, this monument, telling him what it was.

Q. I am asking you what the conversation was you had with him.

A. I am telling you what the conversation was. This was all in the shape of conversation; I told him that by measuring along the line between this monument and where we were standing 170 feet he would find the exact point where the old location monument stood. Well, he said, we have made quite an examination for
355 these monuments, and there is no means of identifying them, the stakes being gone or if present no writing upon them, and would like to have you show us all you know. I told him certainly; I then went with Mr. Heiniman to the northeast corner of the claim, about 250 feet from where we were in conversation, and looked for this corner monument. The stake was gone and the stone pile that belonged with it was scattered so that you could not identify the conditions as a monument at all, but I showed him that right there the monument must belong; then told him that by following the line from this to the other monument that I had shown him, and by changing the distance 300 feet from there——

Q. That is not material.

A. Well, that is the conversation that occurred.

Q. You showed him that northwest corner?

A. Yes, sir.

Q. Now what was said in that conversation about that Scranton mine, the conflict between——

A. Well, he asked me to tell him all about the mine, and where we were standing where I showed him this northeast corner I told him that this corner was not situated upon the property known as the Compromise, but at this point the Compromise lapped on to the Little Nell, and that the Little Nell mine was patented, and that small fraction of ground there was of course lost to the Compromise. With reference to the Scranton I told him that along up the mountain and about the middle of the claim the Scranton mine, which was then patented, cut off quite a little section of ground off of the Compromise, probably as much as half an acre to an acre, and that the Scranton being patented property that fraction was lost to the Compromise.

Q. I will ask you what was said there, if anything, as to
356 other claims, that there had been nobody but yourself, and that you had let your time elapsed and had no claim whatever?

A. No such conversation took place.

Q. And what did you say about wishing them success and hoping that it would prove to be a good mine, and if it did it would benefit you because you owned an interest in the Little Nell, just north of it?

A. At that time and long before, Mr. Heiniman and Crary knew all about the relations of the Little Nell and the Compromise, knew that I was connected with the Little Nell; we had talked about that fact, they had told me about the prospecting of the Little Nell, and had full information about all the relations existing there, and no conversation of that character was had at that time. None whatever; and for either of us to have had any conversation at that time on those subjects would have been entirely superfluous.

Q. I am asking you what was said about those things to which I have directed your attention, Mr. Dye. The Little Nell was one of them and the other one was about your claim to the Compromise?

A. Nothing was said.

Q. What was said about wishing him success?

A. Oh, that is possible. I wish everybody success just as I wish everybody good morning and good evening.

Q. What did you say about hoping he would make a mine out of it?

A. I have no knowledge of any such remark.

Q. State whether or not you ever had any other conversation with Mr. Heiniman in which anything such thing was said with reference to your interest in the Compromise?

A. I suppose so. I have no doubt it is true that I have told Mr. Heiniman in various conversations that we have had upon all
357 manners of subjects that I had at one time owned five-sixths of the Compromise mine. I have no doubt that I have told

him, as I have told anybody else who made it their business to make inquiries of me, that fact.

Q. What fact?

A. That I had been the owner of five-sixths of the Compromise mine, and that I was sold out under attachment in my absence from the territory.

Q. At the time that you made these statements what knowledge did you have of the state of the record with reference to this attachment suit?

A. None whatever.

Q. Did they intimate or say anything to you, either Crary or Heiniman, at any time, that they were relying upon your statements that you had been sold out or anything of that kind?

A. No intimation of the kind ever occurred to me.

Q. Now with reference to Mr. Crary, you heard the statements, you heard his deposition read here?

A. Yes, sir,

Q. State whether or not you made any statements to him as stated in that deposition with reference to having lost your interest in the Compromise by being sold out or letting it lapse, or anything of that sort?

A. I think the first conversation that ever took place between Mr. Crary and myself upon that subject was there on the (lead?) of the Compromise, in which he expressed his full knowledge of the fact that I had at one time been connected with it, and expressed sympathy with me that I had lost it. That conversation occurred at the mouth of the old tunnel.

Q. When was that?

A. That was probably in—That was very probably in the month of July, 1900.

Q. Well, did you make any such statement as was attributed to you? What did you say to him about having lost it?

358 A. I stated that he stated that fact to me, that he was sorry that I had lost it.

Q. What did you say about it?

A. Well, I made a casual remark, I suppose that that is not the only misfortune I had sustained, or words to that effect.

Q. Did you ever have any other conversations with him on the subject?

A. I don't remember whether I had a conversation. Mr. Crary and myself didn't talk together as much as Mr. Heiniman and myself, because Heiniman was a great deal about my assay office, and casual conversations of a minute or two minutes or five minutes would take place once or twice or three times a week.

Q. State how often you rode up and down from town to the mines with Crary and Heiniman?

A. I have no recollection whatever at any time to have ever ridden up from the town to the mines with Heiniman and Crary, or either of them.

Q. But down from the mines to town?

A. On two occasions, in 1899, I think. I rode in a buckboard with

them from the Boston Boy mine that they were then operating down to town.

Q. How about 1900? Did you ride with them?

A. In 1900 they were mining on the Compromise, about a quarter of a mile from where I was mining; I would rarely see them in the morning, because they would go before I did. I had the office business down town to attend to, purchasing and answering of letters, or things of that kind. I don't remember of ever having rode up to the mine with them; I don't think I did. I remember of one occasion they drove past me when I was coming down town, and they asked me to get into their wagon. There were four men in at the time and I respectfully declined, and I think I can state most positively
359 and emphatically that if ever I rode down town with them from the Compromise I don't remember it; and I state most emphatically that the statements about me frequently riding with them is absolutely without truth.

Q. Now with reference to the statements attributed to you by Robison and McIvers and Despain, and these other parties, I don't remember who they were, Fuston, state whether you ever made any such statements with reference to your title or interest in the Compromise, and if so, if you made any statements in that subject what did you say?

A. Well, sir, I think I can answer that general question in quite a general way.

Q. That is just what I am asking for—a general answer.

A. Many people annoy me by inquiries for reasons of their own, I don't know why about this sale of my property, and I had but one thing to say and that was that I had lost it by being sold under attachment in my absence from the territory, and no man or woman who states under oath or otherwise that I have made any other statement or representation about it states that which is false.

Q. What did you suppose to be the facts at the time you made these statements? Go ahead and answer the questions?

A. I made those statements because I believed them to be true at the time.

Q. What information if any did you have that any of those people would repeat those statements to anybody or that anybody would act on them in any way?

A. None whatever.

Witness excused.

B. H. DYE, being first duly sworn according to law upon his oath testified as follows to-wit:

360 Examination by Mr. CHILDERS:

Q. Mr. Dye, I will ask you to state *what*, when you first became acquainted with Heiniman and Crary?

A. First very soon after I returned to White Oaks in the spring of—well when I first returned to White Oaks.

Q. Don't you remember the year?

A. Well it was—what does the record show about that date; it was '89 was it not, '89 I think yes, sir, I was absent during all of '88 and I returned in '89.

By Mr. FERGUSSON:

Q. You stated '89, you mean '99?
A. Yes, sir.

By Mr. CHILDERS:

Q. What were they engaged in doing at that time, what were Heiniman and Crary engaged in doing any mining at that -ime?
A. Well they were working upon the Boston Boy mine claimed as I understood under a bond and lease.
Q. Well they were working on the Boston Boy mining claim?
A. Yes, sir.
Q. State whether or not you were more or less intimate with them and if so on what occasion.

Mr. Fergusson objects to that; what has that got to do with the case; this reference to the acquaintance of the witness with Heiniman and Crary.
Objection over-ruled.
Defendant excepts.

A. On what occasion?
Q. Yes, sir, how you were acquainted with them, what your relations were with them?
A. Mr. Crary came and introduced himself to me, told me what he was doing; that he had been informed that I had performed some work upon the Boston Boy claim for the owners the year previous, two years previous, and had made certain discoveries
361 there with reference to ore and wanted me to visit the Boston Boy and go over the subject with him.
Q. I don't care particularly what you did with reference to the Boston Boy claim itself the details, but I am talking about your acquaintance and what you did with them between that time and the time they took charge and while they were working the Compromise mine?
A. I visited them at the Boston Boy and there the acquaintance began.
Q. Yes, sir; we got that?
A. They were mining people, so was I; they thought they would get information of me and I hoped to get information of them.
Q. About what?
A. About mines generally; and the acquaintance was continuous up to the time they went into the Compromise claim under the bond and lease of Taliaferro.
Q. And afterwards or not?
A. Yes, sir.
Q. State whether or not you were supposed to have some technical knowledge of the subjects of the science bearing upon mining and location of mines and parts of minerals?

A. Yes, sir, I think so, I have made a long effort to inform myself in that subject.

Q. State whether or not it was not a constant source—it was not a subject of general conversation between you and them whenever you met, that subject — to the formations and other questions bearing upon those mines?

Objected to as immaterial and leading.

By the COURT: It remotely reflects upon that he visited them.

Objection over-ruled.

A. Yes, sir, that was most always the subjects of our conversations.

Q. It has been read in evidence here that you had some
362 correspondence with Mr. T. C. Johns while you were away from White Oaks from 1897 to 1899 with reference to the Compromise claim. I will ask you if you had any correspondence or conference with Mr. Johns during that period with reference to the assessment work on that claim in 1898, if so, state whether it was by correspondence or conference?

A. Yes, sir, I had both correspondence and conference.

Q. Do you know where the correspondence is which you had with him, what has become of it?

A. Well, I suppose that is lost years ago.

Q. Do you know?

A. Well I know I didn't keep it; it was of no importance, I didn't keep it.

Q. Now state what understanding if any and how, you had with Mr. Johns about the assessment work on that property in 1898?

Object to the contents of that correspondence; he has shown that he didn't keep it; if he didn't keep this correspondence it is therefore not within his control and the further objection that he is making the testimony for himself.

Objection over-ruled.

Exception.

A. I had an understanding with Mr. Johns in Denver in 1898 that was as I take it a part or a continuance of the understanding and business relations we had back into 1897 and I suppose I might as well state the two together.

Q. If it bears upon the assessment work of 1898?

A. Well I will state it and you can guide me in that matter; of course I ask to be guided in that matter. Mr. Johns, C. T. Johns in the summer of 1897 purchased the Heman interest in the Compromise mine; at the time this occurred I was doing the as-
363 sessment — upon the Compromise mine and Mr. Johns visited me in the Compromise mine; at the time this occurred I was doing the assessment work upon the Compromise mine and Mr. Johns visited me there. After quite a conference upon the subject of the property, the Heman interest and etc., he said that he was going to buy it; that he had a proposition and was going to close on it and that he was going away and wanted me to take care of the Heman assessment interest for 1897 for him to which I agreed and performed

the work Mr. Johns having gone; but Mr. Johns requested in a day or two afterwards to make him a proposition in writing for the purchase of my interest five-sixths of the Compromise and I made him a written proposition which he carried away with him. This I think was in July, 1897. In August, 1897, I went to Colorado, being down by the panic in White Oaks in our mining interests by the panic there I was taken sick at Durango and subsequently was able to go to Colorado Springs and again later got to Denver. There I met Mr. Johns and had further conference there with Mr. Johns; he had in the month of October, 1897, paid me for the assessment work interest that I had agreed to do for him on the Compromise claim; there he requested me—we met then quite frequently on the streets and in his office, there he requested me again for another proposition for the purchase of my interest in the Compromise. I gave him another in the shape of a memorandum.

By Mr. FERGUSSON:

Q. In writing was it?
A. Yes, sir.

By Mr. CHILDERS:

—. ——.

A. Setting the price and as I judge limiting him to time. He then told me that he was going to White Oaks, from White
364 Oaks he was going to the east where he had a deal on to sell the North Homestake claim the property of the Apex Company and that he wished the Compromise claim in the pool. He said that inasmuch as I had done the assessment work for him previously in '97 he, on his return to White Oaks, then to take place shortly, he would see after the question of doing the assessment work on the Compromise claim for 1898.

Q. When was this conversation that he said he would do that?
A. I think——
Q. As well as you can fix the date?
A. Let me state about that matter I can——
Q. What year?
A. That was in 1898.
Q. Go on?

A. That was after I had returned from Ohio; that was after I returned from Ohio, yes, sir—no—yes, yes that was after I returned from Ohio, that was in the early fall I would not undertake to assign the date within a month, but it was in the fall of 1898. Now, previous to this—I have got the two dates a little confused; let me correct it. In the fall of 1897 when Mr. Johns settled with me for the assessment work there in Denver, I then gave him an extension of time on this proposition that I had given him at White Oaks. He complained that because of the broken down conditions of the time, panics, etc., he could not deal; I gave him that extension of time. I left Denver in November in '97 and went to Ohio, there I was down sick almost all the winter, up and down. There I got a letter from Mr. Johns, and now I want you to guide me when I in-

fringe the rule, instruct- me or informed me that he was about to close his deal and requested me to execute a deed for my interest in the Compromise claim and send it to some person in White
365 Oaks, New Mexico, leaving it there in escrow, and if he could make the deal under contemplation he would pay the money for the deed and take it up. I executed the deed at Troy, Ohio, about January or February or March, '98, and sent it to Mr. Joseph A. Gumm in escrow directing Mr. Joseph A. Gumm to deliver the deed to Mr. Thomas C. Johns upon the payment of $1,500, the consideration set out in the deed, and notified Mr. Johns by letter of what I had done. My impression is that that was the consideration; previous to that my—the consideration set out in our memorandum—my memorandum to him was $2,000, but just what instructions I gave——

Q. Never mind the instructions to Mr. Gumm, go on and state the arrangement if any with Mr. Johns?

A. Well that was part of the agreement with Johns.

Q. You have given that?

A. I modify that. I will not state positively what the consideration was, whether $1,500 or less, I know there was modification of the price during the time these negotiations were going on. Well I returned then to Denver from Ohio in June, 1898, for reasons now that I don't remember. I was unable to see Mr. Johns for some weeks; finally saw him in his office at Denver. The question was discussed then why he had not taken up that deed; general subject of the Compromise claim, etc., prospecting and of the sale and he then told me that he was going to White Oaks shortly and from White Oaks was going east; that he wanted this deed to still remain in escrow; that he expected while in the east to close the deal that he had on hand for a long time, and if not, he could place the Compromise property along with his deal for the Apex Mine provided he controlled the whole title. I then agreed with him that
366 the deed should remain in escrow until he had full opportunity, and further agreed then with me the matter that I stated previously that inasmuch as he would be down there and I didn't know when I would be there to White Oaks and inasmuch as I had attended to his assessment the year previous, he while at White Oaks would arrange about the assessment. I never saw Mr. Johns subsequently, made frequent visits to his office, never found anybody there; I had met his partner on the streets.

Q. That don't make any difference?

A. But I didn't get any talk with Mr. Johns.

Q. Haven't seen him since?

A. No, sir, haven't seen him since, only had the communication with him—I suppose I have written him, but never got any return from him and subsequently heard of his unfortunate death in the east.

Q. Where did you understand he died?

A. He died——

Q. When did you understand that he died after what year and after this conversation?

A. Well now this must—it was after this conversation and early in the ensuing year, but I don't know, that is all hearsay. I haven't any definite information upon the subject, it is all hearsay.

Q. With reference to his death and when he died is all hearsay?

A. Yes, sir.

—. That is all unless there is something else you want to state.

Plaintiff offers in evidence certified copy of Quit-Claim Deed marked Exhibit S.

Quit-Claim Deed.

This indenture made the eleventh day of October, in the
367 year one thousand nine hundred and one, between Harry C. Crary and Catherine M. Crary, his wife, of the first part, and Wayne Van Schoyok of the second part:

Witnesseth, that the said parties of the first part for and in consideration of two thousand ($2,000.00) dollars lawful money of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have remised, released, sold, conveyed and quit-claimed and by these presents do remise, release, sell, convey and quit-claim unto the said party of the second part and to his heirs and assigns forever all the right, title, interest, claim and demand whatsoever of the said parties of the first part, of, in and to the following described lands, tenements and real estate, to-wit: the undivided fifty-one, four hundred and thirty-two hundredths (51-432) of the mine or mining claim, named and known as "The Compromise Mine" or "The Compromise Lode Claim" situated in the White Oaks Mining District, in Lincoln County, New Mexico, and in Baxter Mountain and westerly from the mine known as the "North Homestake" on the westerly branch of Baxter Gulch and southerly from the Little Nell Lode Claim and as appears by the location notice of same by Benjamin H. Dye and others of the record in the office of the official recorder for said Lincoln County, to which reference is made for full description.

Also an undivided one-sixth (1-6) of the mine or mining claim named and known as the "Smuggler" as located by Henry Bistch on the 23rd day of February, A. D. 1901, and recorded April 11th, 1901, in Book T of records of Lincoln County, New Mexico, page
99. Also an amended location made by Henry Bistch and
368 others on August 31st, 1901, and recorded September 3rd, 1901, in Book T at page 289, in said records of Lincoln County, New Mexico. Said Smuggler being located on Baxter Mountain, White Oaks Mining District, Lincoln County, New Mexico.

Reference is hereby made to above mentioned mining location notices for a full description of the Smuggler Claim, it being the same property deeded Eugene Heiniman and Harry C. Crary on the 9th day of April, 1901, by said Henry Bistch.

To have and to hold, all and singular, the above mentioned and described premises, with the appurtenances and privileges thereunto belonging or in anywise appertaining; and also the estate, right, title, interest and claim whatsoever of the said parties of the first part

either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

HARRY C. CRARY. [SEAL.]
CATHERINE M. CRARY. [SEAL.]

Signed, sealed and delivered in the presence of
JOHN H. CANNING.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Be it remembered, that on this 11th day of October, A. D. one thousand nine hundred and one, before the undersigned, a notary public in and for said county, in the territory aforesaid, came Harry C. Crary and Catherine M. Crary, his wife, personally known to me as the persons whose names are subscribed to the foregoing deed, and as parties thereto they each acknowledged that they
369 signed, sealed and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth.

Witness my hand and seal the day and year last above written.

[SEAL.] JONES TALIAFERRO,
Notary Public.

Filed for record on the 14th day of October, 1901, at 9 o'clock a. m.

I. L. ANALLA, *Recorder.*

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, W. E. Kimbrell, probate clerk and *ex-officio* recorder in and for the County of Lincoln, in the Territory aforesaid, do hereby certify that the foregoing is a true and correct copy of an instrument which appears of record in my said office in Book S of Deeds at Pages 349 and 350.

Witness my hand and official seal this 17th day of June, A. D. 1905.

W. E. KIMBRELL,
Probate Clerk and Ex-officio Recorder of Lincoln County, New Mexico,
[SEAL.] By E. W. HULBERT, *Deputy.*

Mr. FERGUSSON: No objection.

Plaintiff also offers in evidence certified copy of quit claim deed marked Ex. T.

Quit Claim Deed.

This Indenture, Made the twenty-third day of September, in the year one thousand nine hundred and one, between Eugene
370 Heiniman and Eunice Heiniman, his wife, parties of the first part, and Charles Spence, Joseph E. Spense and Jones Taliaferro, parties of the second part;

Witnesseth, That the said parties of the first part, for and in consideration of seven hundred fifty and 00-100 dollars, lawful money of the United States, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have remised, released, sold and conveyed and quit claimed, and by these presents do remise, release, sell, convey and quit claim unto the said parties of the second part, and to their heirs and assigns forever, all the right, title, interest, claim and demand whatsoever for the parties of the first part, of in and to the following described lands, tenements and real estate, to-wit: The undivided one-twelfth (1-12) interest of the mine or mining claim, named and known as the "Compromise" mine or the Compromise mining claim, situated in the White Oaks mining district, Lincoln county, New Mexico, and in Baxter mountain and westerly from the mine known as the "North Homestake" on the westerly branch of Baxter Gulch, and southerly from the "Little Nell" lode claim, and as appears by the location notice, same by Benjamin H. Dye and others, of record in the office of the official recorder for said Lincoln County, to which reference is made for full description, this being the same property conveyed to said Eugene Heiniman by deed dated October, 1900, by Jones Taliaferro and wife to Harry C. Crary and Eugene Heiniman.

To have and to hold all and singular the above mentioned and described premises, with the appurtenances and privileges thereunto belonging, or in anywise appertaining; and all the estate,
371 right, title, interest and claim whatsoever of the said parties of the first part, either in law or equity, to the only proper use, benefit and behoof of the said parties of the second part, their heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of

[SEAL.] EUGENE HEINIMAN.
[SEAL.] EUNICE HEINIMAN.

TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

Be it remembered, that on this 23d day of September, A. D. one thousand nine hundred and one, before the undersigned, a notary public in and for said county, in the territory aforesaid, personally came Eugene Heiniman and Eunice Heiniman, his wife, personally known to me as the persons whose names are subscribed to the foregoing deed, and as parties thereto they acknowledged that they

signed, sealed and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth.

Witness my hand and seal this day and year last above written.

[SEAL.] JOHN H. CANNING,
Notary Public.

Filed for record September 25th, A. D. 1901, at 10 a. m.
I. L. ANALLA, *Recorder.*

372 TERRITORY OF NEW MEXICO, *County of Lincoln, ss:*

I, W. E. Kimbrell, probate clerk and *ex-officio* recorder in and for the County of Lincoln, Territory of New Mexico, do hereby certify that the foregoing is a true and correct copy of an instrument which appears of record in my said office in Book S of Deeds at Pages 330 and 331.

Witness my hand and official seal this 17th day of June, A. D. 1905.

[SEAL.] W. E. KIMBRELL,
Probate Clerk and Ex-officio Recorder of Lincoln County, New Mexico,
By E. W. HULBERT, *Deputy.*

It is stipulated that H. B. Fergusson admits that he has a deed to an undivided one-twelfth (1-12) interest of the Compromise mining claim, now in controversy, and that the deed was made after bringing this suit.

Court in recess until 2 o'clock.

Mr. Childers asked the privilege of asking Mr. Haley a few more questions.

JOHN A. HALEY recalled by Mr. Childers:

Q. Mr. Haley can you tell who gave that notice of forfeiture which you produced here last night to the White Oaks Eagle newspaper for the purpose of publication?

Mr. FERGUSSON: Object to that as immaterial.

By the COURT: That as tending to establish that Johns didn't do the assessment work or that this company did it.

Objection overruled.

Defendant excepts.

Q. You may answer the question.

373 A. I don't believe I can state positively; I can give an impression as to my recollection.

Q. Well, your best recollection is what I am asking for?

A. I am under the impression that both Mr. Johns and Walsh came up there the same time. I don't know which one gave me the notice.

Q. When did Mr. Johns die, if you know?

A. It was two or three months after this time.

Q. After the first publication?

A. After he appeared in my office.

Q. That first date I believe was the 5th day of January, 1899, the first day of publication was the 5th day of January, 1899, two or three months after that day?

A. I am not sure; I think so, sometime in early part of the following year that he died.

Q. Where did he die?

A. Where?

Q. Yes, sir.

A. In New York City I understand.

Q. You say you are not certain whether Mr. Johns gave you that notice or said anything to you about it or not?

A. I am sure he said something about it, but he might not been present at the time the notice was brought in.

Q. Is it not a fact that Mr. Johns left White Oaks in December, 1898, and never did come back there?

A. It is possible he left there before the first of January, I don't recall that; I know he was not there but a few days after he was in my office.

Q. Do you know whether he was there in January in White Oaks at all?

A. No, sir; I don't recollect.

JONES TALIAFERRO recalled by Mr. Childers:

Q. You reside in White Oaks?

A. Yes, sir.

Q. When was the last time, what month and year was the last time you saw Mr. T. C. Johns in White Oaks?

A. I believe it was in 1899.

374 Q. What month?

A. I think it was in the fall, I am not positive.

Q. The fall of 1899?

A. I think so.

Q. Was it not the fall of 1898?

A. Well it might have been—might have been.

Q. Didn't he die early in 1899?

A. Well, I don't remember; I heard that he had died; I forget the year.

Q. Well, the fall before he died, was it not?

A. Yes, sir.

Q. You left there?

A. Yes, sir.

Q. Were absent?

A. Yes, sir.

Q. Were you absent you know of during the winter months of 1898 and '99?

A. Yes, sir.

Q. Where were you; were you absent from White Oaks December and January, 1899?

A. I think not; I am in and out but only off a short time if at all.

Q. Were absent February 1899, if you remember?
A. I don't understand.
Q. Do you remember being absent any time in February or March, 1899?
A. No, sir; I do not.
Q. And up to June, 1899, except just out of town for a day or two?
A. No, sir; I was away for no length of time I am certain.
Q. If Mr. Johns had been there for any length of time while you were in town you would have seen him?
A. Yes, sir.
Q. If he had been there for two or three days you would have seen him?
A. If he was in town; yes sir; sometimes Mr. Johns was quite late and stai-d out at his house in the suburbs at his place and I might not have seen him.
Q. But you would have known of his being there?
A. I rather think so, yes, sir.

Jury taken out.

375 Mr. CHILDERS: Plaintiff moves to strike out all the testimony received in evidence by the court with reservation as to its final admissibility as stated by the court at the time, including the testimony of Frank Alexander, W. M. Despain, W. R. Fuston, W. A. McIvers, John H. Robertson and all the other witnesses testifying to any conversations with the plaintiff Dye with reference to the sale of this property under attachment or having permitted it to lapse for the reason of failure to do work on it or by failure to redeem upon the ground that there is no evidence that such communications were ever communicated in any way, such conversations and declarations alleged to have been made by Dye, were ever communicated in any way to the defendants Crary and Heiniman; that Dye did not know what the state of the title was at the time they were made any more than Heiniman and Crary, because the title was a matter of record open to both parties; because the records show that the defendants Heiniman and Crary employed an attorney to examine the records and ascertain the state of the title and because Dye had no notice that they were to be influenced by such conversations or declarations or that they were to be repeated to them and owed them no duty and did not make such declarations for the purpose of influencing their conduct in any way and does not tend to establish an estoppel, and they do not amount to an estoppel.

2. The plaintiff moves to strike out the testimony of H. C. Crary for the reasons above stated except the ground that the same were not communicated to them which does not apply to those witnesses, the conversations having taken place, alleged conversations, having taken place directly with them and also for the further reason that these two defendants state positively that they did not inform

376 Dye that they were relying on his declarations or that they were making inquiries of him for the purpose of relying on them, and Dye had no reason to suppose that they were so relying

upon them and they had no right in law to rely upon them, and Dye owed them no duty whatever, no confidential relations existing between them; also all testimony with reference to acquiescence and laches or abandonment, alleged abandonment, in the records; and also with reference to the forfeiture incurred by the publication alleged to have been made in the White Oaks Eagle in evidence, for the reason that the title of the plaintiff Dye cannot be called in question by the defendants' claim under the sheriff's deed; and for the reason that no outstanding title can be set up and plaintiff moves to strike out all the said evidence as immaterial, incompetent and irrelevant.

Plaintiff further moves the court to instruct the jury to find a verdict in favor of the plaintiffs against all of the said defendants.

Plaintiff further moves the court to instruct the jury that as it appears from the evidence that the defendants Heiniman and Crary own no interest in the property and are now not in possession of any part of the property in controversy; and that the jury be instructed to find a verdict in favor of the plaintiff against said defendants Heiniman and Crary for costs and against the other defendants in said cause for the costs; and find a verdict that the said other defendants are guilty of withholding the possession of the said proper-y from the plaintiff and for costs.

Mr. Childers asks leave to ask a question of Mr. Dye which he omitted this morning.

Q. Have you ever heard from Heiniman about the time
377 this case was tried; where was he at that time?

A. Yes, sir; Mr. Heiniman is dead, has been dead, died in Kansas City.

Court in recess until 8 o'clock.

Argument by counsel.

At the conclusion of all the evidence in this case, the defendants move the court to instruct the jury to find said defendants not guilty, for the reason and on the ground that the proceedings and judgment in the attachment suit of Taliaferro *vs.* Dye, in evidence in this case, cannot be attacked collaterally; and also upon the claim and ground that plaintiffs are estopped to maintain this suit—no conflict of testimony on the proposition—that Mr. Dye has admitted and sufficiently acknowledged all the facts and circumstances to put him under the application of the rule of estoppel and precludes and estops him from maintaining this suit.

Plaintiff's motion sustained and defendants' motion overruled.

Defendants except to the ruling of the court in overruling defendants' motion and in sustaining plaintiff's motion.

By the COURT: After these four days the court has determined that as a matter of law there is no question of fact for you to decide in this case and for the purpose the court will instruct you what verdict you will find.

3319.

BENJAMIN H. DYE ET AL.
against
H. C. CRARY.

Under the instructions of the court we, the jury, find the defendants guilty as charged in the complaint.

JAMES PATTERSON, *Foreman.*

By the COURT: This will be your verdict.
Defendants except.

378 I, Minnie McGlinchey, official stenographer of the Third Judicial District of the Territory of New Mexico, hereby certify that the above and foregoing 229 pages constitutes a true and correct transcript of the testimony together with the exhibits taken by me in the case of Benjamin H. Dye *et al. vs.* Harry C. Crary *et al.*

MINNIE M'GLINCHEY,
Official Stenographer, etc.

TERRITORY OF NEW MEXICO, *County of Socorro:*

In the District Court.

B. H. DYE ET AL., Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

Stipulation.

It is stipulated and agreed by and between the counsel for plaintiffs and defendants in the above entitled cause that the motion for a new trial and the action of the court in overruling the same and the action of attorney for defendants in duly excepting to such action of the court shall be inserted in the record by the clerk and shall be considered as a part of the bill of exceptions as fully and to all intents and purposes as if the same had been specially incorporated into and formed a part of said bill of exceptions.

It is further stipulated that the foregoing proposed bill of exceptions, including this stipulation as a part thereof, may be settled, signed and sealed by the judge of the court as the bill of exceptions in this cause.

W. B. CHILDERS,
Attorney for Plaintiffs.
H. B. FERGUSSON,
Attorney for Defendants.

379 TERRITORY OF NEW MEXICO, *County of Socorro:*

In the District Court.

B. H. DYE ET AL., Plaintiffs,
vs.
H. C. CRARY ET AL., Defendants.

And the foregoing was all the evidence, with the objections, rulings, exceptions and other proceedings had in the course of the trial of said cause.

And for as much as the matters above set forth do not appear of record, the defendants tender this their bill of exceptions, and pray that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case made; which is done accordingly this 14th day of September, A. D. 1905.

[SEAL.] FRANK W. PARKER, *Judge.*

TERRITORY OF NEW MEXICO,
Third Judicial District, County of Socorro, ss:

I, William E. Martin, clerk of the District Court of the Third Judicial District of the Territory of New Mexico, and in and for the County of Socorro, do hereby certify that the foregoing is a true, complete and correct transcript and copy of all the proceedings and pleadings in said cause, including bill of exceptions, as the same remain of record and on file in my office.

Witness my hand and the seal of said District Court this 30th day of September, A. D. 1905.

[SEAL.] WILLIAM E. MARTIN,
Clerk of said District Court.

The Territory of New Mexico to Benjamin H. Dye and William B. Childers, Greeting:

You are hereby notified that in a cause lately pending in
380 our District Court for the Third Judicial District of the Territory of New Mexico, within and for the County of Socorro, wherein Benjamin H. Dye and William B. Childers were plaintiffs, and H. C. Crary *et al.* were defendants, the said plaintiffs have sued out an appeal to the Supreme Court of the Territory of New Mexico from the judgment of our said District Court; and you are hereby cited and required to appear in our said Supreme Court within ninety days from the first day of September, A. D. 1905, then and there to answer said appeal.

Witness the Honorable Frank W. Parker, associate justice of the Supreme Court of the Territory of New Mexico and judge of the Third Judicial District Court thereof, and the seal of said court, this 27th day of September, A. D. 1905.

[SEAL.] WILLIAM E. MARTIN, *Clerk.*

Received a copy of above citation this 30th day of September, 1905.

W. B. CHILDERS,
Attorney for Plaintiffs.

381 Which said transcript of record was endorsed as follows to-wit: "In the Supreme Court of the Territory of New Mexico, January Term A. D., 1906. Benjamin H. Dye, *et al.*, Appellees, *vs.* H. C. Crary *et al.*, appellants, No. 1113, Appeal from District Court Socorro County, Transcript of Record, Filed in my office this 11th day of October, A. D., 1905."

And Afterwards, on to wit *on* the 27th day of August A. D., 1906, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a stipulation, in the above entitled cause, which said Stipulation was and is in words and figures following to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1113.

BENJAMIN H. DYE ET AL., Plaintiff and Appellees,
vs.
H. C. CRARY ET AL., Defendants and Appellants.

Appeal from District Court, Socorro County, on Change of Venue from Lincoln County.

It is stipulated in this case that the testimony of H. C. Crary as it appears in the Transcript of case No. 988, on the docket of the Supreme Court of the Territory of New Mexico, may be inserted in the transcript to be prepared of the above case No. 1113, by the Clerk of the Supreme Court of the Territory of New Mexico, on a writ of error to the Supreme Court of the United States, as the testimony of said H. C. Crary, does not appear in full in the case as Numbered 1113 on this docket,—the cross-examination of said Crary having been by mistake omitted in the transcript of case No. 1113 on this docket.

W. B. CHILDERS,
Attorney for Plaintiffs and Appellees.
H. B. FERGUSSON,
Attorney for Defendants and Appellants.

382 Which said stipulation was and is endorsed as follows to-wit "No. 1113—Dye *et al., vs.* Crary *et al.*,—Supreme Court of the Territory of New Mexico,—Stipulation,—Filed in my office this 27th day of August, 1906, José D. Sena, Clerk."

And the following to wit: is the testimony and cross examination of H. C. Crary, as taken from the Transcript of record filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico in the case above entitled and Numbered 988 in the docket of this court, as follows to wit:—

383 HARRY C. CRARY one of the defendants, being introduced as a witness, and having been duly sworn, testified as follows on direct examination by Mr. Fergusson:

Q. State your name, age, residence and occupation?
A. Harry C. Crary, age 63 in October, residence White Oaks, New Mexico, and occupation, prospector.
Q. Are you one of the defendants in this case?
A. I am.
Q. How long have you lived in White Oaks?
A. Two years the 4th of July.
Q. How long have you been engaged in the business of mining and prospecting?
A. Since 1867.
Q. You know the defendant B. H. Dye?
A. I do.
Q. Did you take a bond and option, along with the defendant Eugene Heiniman, on the Compromise claim in the White
384 Oaks mining district?
A. I did.
Q. And when?
A. On the 5th day of June, 1900.
Q. From whom did you take the bond and option?
A. Jones Taliaferro.
Q. Did he deliver possession of the mine to you at that time?
A. He did.
Q. Did you take up the bond and option, and purchase the property afterwards, if so, when?
A. On the 1st day of November, 1900.
Q. How much did you pay for it at that time, what was the purchase price?
A. $1500.
Q. How soon after June 5th did you begin your work on the mine and how long did it continue?
A. We commenced, in a few days, within a week.
Q. How long did the work continue under your operations?
A. Until some time about the 17th or 20th day of January, 1901.
Q. How much money was expended in these operations in prospecting and developing that mine, about?

Mr. CHILDERS: Objection, as irrelevant, immaterial and incompetent.
COURT: Objection overruled, and exception to plaintiffs.

A. I have not the exact figures, but something like about $6,000.
Q. What business was Mr. Dye engaged in, while you were de-

veloping and working this mine, prior to November 1st, when you took up the option?

A. He was superintending the Lady Godiva mine, and
385 having some work done on the Little Nell claim.

Q. Did you see him frequently during this time?

A. Yes, sir.

Q. Did his work and yours take you along the same road, in going and returning from White Oaks to your work?

A. It did.

Q. Did you ever ride together, and if so, about how often, or walk together to and fro, during that time?

A. I had my own team, and he often rode up and down.

Q. State whether or not, he visited the mine while you — working during that time, and if so how frequently?

A. He was there often.

Q. Did he know during this time, the way in which you were working the mine, under bond and lease, as you say, from Jones Taliaferro?

A. Yes, sir.

Q. How do you know that he had that knowledge?

A. I told him.

Q. State whether or not, conversations took place between you and Mr. Dye, either in White Oaks, or along the road which you traveled in common, or on the Compromise mine during this time, on this subject, and on the subject of the development work that you were doing, and if so, how frequently you talked with him on this subject?

A. The first conversation I had with Mr. Dye was a few days after the ore was struck in the tunnel.

Q. Was that the first rich strike, and when was it about that it was struck?

A. It was struck sometime in August.

Q. Were you present when it was struck?

386 A. I was not.

Q. Where were you?

A. Examining some mining property up on the Ruidoso.

Q. You returned to White Oaks how long after it was struck, about?

A. Four or five days.

Q. What miner made the strike?

A. Mr. Fuston.

Q. The witness who has been here today?

A. Yes, sir.

Q. Did you learn from him whether or not Mr. Dye had been up to see the strike before you returned?

Mr. CHILDERS: I object to the answer to that question.

COURT: Overruled.

Mr. CHILDERS: Exception.

A. He said he had been there.

Q. Did he report any conversation that Mr. Dye had had with him before you got back?

Mr. CHILDERS: Objection to the question and answer, as hearsay.
COURT: Sustained.
Mr. FERGUSSON: Except.

Q. Do you pretend to give the exact words or the substance of it?

Mr. CHILDERS: Objection, as irrelevant, immaterial and incompetent.
COURT: Objection sustained.

Q. Now come to the first conversation which you say you had with Mr. Dye, and state when it was with reference to your return, where it was, and all that you can remember of the conversation itself?

Mr. CHILDERS: Objection to that question and answer, upon the ground that it is irrelevant, immaterial and incompetent,
387 and does not tend to raise any estoppel, because the recorded title to the property was open to both parties equally, as is already shown by the testimony of the witness Heiniman, who was Crary's partner, that he had caused the records to be searched and examined, and procured an abstract of title, had his attorney to examine it and pass upon the title.

COURT: Objection overruled, with the right to move to strike out.
Mr. CHILDERS: Exception.

A. I returned home on Friday evening, and Saturday I took a man by the name of Millington and some timber, and put in two sets of timber in the mouth of the tunnel and put doors on them. Monday Mr. Dye came there while I was there. I took him through the tunnel, showed him the ore, and how it laid in there, panned some for him; and we went up to the mouth of the old tunnel to show how I came to get onto the ore. I explained the trench run from the old tunnel out to the west, I saw the ledge of quartz porph-ry, and examined it closely for blossom that might have been thrown out along the bank while this trench was being done. I showed him the float that I had found there, where I had dug in and discovered the lead, and that then I had gone down the hill and run this cross-cut tunnel to strike the ore at a depth. I then took him to the mouth of the old tunnel, and showed him upon the bank some float must have been thrown out when they started the tunnel, which led me to think that the ore was in the tunnel when they first started on that vein. I then cross-cutted across the entrance of the old tunnel where they had done their work; that I had found these
388 indications, and went to Mr. Taliaferro and secured an option upon the property, telling him the time and terms of the option. He said that he had owned the property and that he knew of this ore in the mouth of this old tunnel and had some assays out of it, but that it was not of sufficient value to warrant his working on it, specially as at that time, there was no way to treat these sul-

phides, even if they had been worth $50 a ton, that they had done a great deal of work there, but had failed to catch any ore of sufficient value to warrant working the claim; that he had allowed his time to expire and hoped that we would do well on it, that he made no claim to it, as he had owned the property on the otherside of the gulch; and if we could get good ore there, it would make his Little Nell property more valuable. I think that is probably all the conversation that occurred at that time. I was elated over the discovery of this ore, both of us talked a good deal and both of us felt good.

Q. Do you remember a conversation between Dye and yourself and Heiniman, at which one F. B. Alexander was present, who was working for you?

A. I do.

Q. About when was that conversation?

A. I don't remember the exact day.

Q. Was it before or after this option was taken up and the mine paid for?

A. It was before.

Q. Give that conversation, as near as you can remember it, stating how it came up, if you know?

Mr. CHILDERS: Same objection as to the last preceding question.

COURT: Objection overruled, with the right reserved to
389 counsel to move to strike out.

Mr. CHILDERS: Exception.

A. Mr. Dye was there, and Mr. Heiniman asked him, I can hardly remember the exact words, but in substance whether the title to this property, the Compromise mine, was all right. Mr. Dye replied that there was some drawn ground between it and the Scranton, and it on the side that would belong to the Scranton. It was an over-lap; that there could be no other claimant, unless it was him, and he had allowed his time to lapse and made no further claims to the property. He also added, I hope you will do well with the property, and make lots of money out *fo* it.

Q. Do you know what purpose Heiniman had in making that inquiry at that particular time?

Mr. CHILDERS: Objected to as irrelevant and immaterial, as to what his purpose was.

COURT: Objection sustained. I think you must stand on what he stated, not what their purpose was.

Mr. FERGUSSON: Exception.

Q. If you had learned at that time, you and Heiniman, from Mr. Dye, that he expected to assert any claim against the property, state whether or not you would have completed the payment for it?

Mr. CHILDERS: Same objection to that question and answer as to the last preceding question put to the witness.

COURT: Overruled.

Mr. CHILDERS: Exception.

A. I don't think we would.

Mr. CHILDERS: That question and answer is also objected to, as incompetent and immaterial.

Q. State whether or not, that you spent the money that
390 you have mentioned in developing said property, and in finally paying for it and taking a deed to it, in reliance upon Mr. Dye's statements that you have detailed, and upon his course of conduct while you were operating the mine under that bond and lease?

Mr. CHILDERS: Objected to as irrelevant, and that a party to a suit cannot make evidence for himself, in his own favor, as to what his intentions were.

COURT: Objection overruled.

Mr. CHILDERS: Exception.

A. We done the work, and paid the payment on the repeated assurance of Mr. Dye that he made no claim to it, and would not have touched the property in the first place had we known that he made a claim or had a claim.

Q. State whether or not, Mr. Dye, at any time, while your operations were going on under that bond and lease, ever did anything to your knowledge, or said anything to you, indicating that he had or would make any claim to the property, or give you any warning in any other way?

Mr. CHILDERS: Same objection as to the last preceding question objected to.

COURT: Objection overruled.

Mr. CHILDERS: Exception.

A. He did not.

Q. What was the cash value of the Compromise in your opinion just before your operations began on it under the bond and lease, before you discovered any indications of ore?

A. I don't consider that it had any cash value. If I had not discovered ore within a few days, I should have dropped the property.

Q. What was the property worth, at the time you shut
391 down, after the suit was brought?

Mr. CHILDERS: Objected to as immaterial and irrelevant, and that the answer is hearsay, that "an expert had reported favorably on a $45,000 option."

COURT: I think the answer should be stri-ken out.

Mr. FERGUSSON: Defendants except.

Q. What is your opinion as to what it was actually worth?

Mr. CHILDERS: Objected to as irrelevant and immaterial.

COURT: I will allow the stenographer to take it down, that in his opinion it was worth $45,000.

Mr. CHILDERS: Exception.

A. (As read to the jury by Mr. Fergusson.) I think it was worth $45,000.

Q. You have detailed two conversations with Mr. Dye relative to

your bond and lease, and the title to the mine, state whether or not there were others, long or short, during that time?

Mr. CHILDERS: Same objection to that question and answer, that it does not tend to raise any estoppel, that the records of the title to the property are open to both parties, and as wholly irrelevant, immaterial and incompetent.

Same ruling by the court.

Mr. CHILDERS: Plaintiffs except.

A. He was often there, often rode down to town with us, and during this time we often talked together in relation to the property. In which conversation he always gave me the same impression, as in the two conversations.

Q. Did Jones Taliferro part with all his interest in that deed delivered November 1st, to you and Heiniman?

392 A. He did.

Q. He has re-acquired an interest since, has he not?

A. He has.

Q. Did he or not have any interest whatever in that property between the time that he made the deed, deliver-d the deed November 1st, 1900, and the time when he had subsequently acquired an interest?

A. None whatever.

Q. From whom did he acquire this interest that he now holds?

A. Myself.

Q. When did you first learn, after you finally paid for the property, November 1st, 1900, that Dye claimed or was asserting any interest in that Compromise claim?

A. On the 17th day of January, 1901, when we were served with the summons.

Cross-examination, by Mr. CHILDERS:

Q. You and Mr. Heiniman were partners in this lease and bond that you took from Mr. Taliaferro?

A. Yes, sir.

Q. Who attended to the business of looking after the title, and such things as that, you or Mr. Heiniman?

A. Mr. Heiniman did that part of it.

Q. You paid no attention to that?

A. Hardly any.

Q. How often did you see Mr. Dye at the mine?

A. I should say from once to twice a week.

Q. Were you there nearly all the time?

A. Most of the time—good deal of the time, nearly every day.

393 Q. He took a great deal of interest in the mines generally around the camp, and in the discoveries generally in that camp did he not?

A. There have been but few discoveries made in the camp but this one, since I have been there.

Q. But he took a great deal of interest in the development and discoveries in old claims in the camp.

A. I can speak for this one, but not for the others.

Q. When did you tell him that you were working that mine under a bond and lease from Taliaferro?

A. Within a week after the bond was taken.

Q. You stated on your direct examination that your first conversation with Dye was within a few days after rich ore was struck in the tunnel, when was that?

A. In August.

Q. What did he say to you, when you first told him that you were working the claim under a bond and lease?

A. That he hoped we would strike it rich and make money out of it; that he once owned it himself, and that he failed to find any ore on it, and that Taliaferro had taken it under an attachment.

Q. When was that conversation?

A. Either about Monday or Tuesday after the first discovery of the rich ore in the lower tunnel.

Q. When was the rich ore discovered in the lower tunnel?

A. Sometime in August.

Q. He did not tell you until after you had discovered rich ore then?

A. We had been working and run this cross-cut tunnel, and up to the time that the rich ore was discovered he hadn't been
394 over to see us at all.

Q. Up to the time the rich ore had been discovered, he had not been over to see you and you had no conversation with him?

A. No, sir.

Q. Had no conversation with you up to that time?

A. Up to that time, no.

Q. He didn't tell you this then, when you first told him that you had a bond and lease on this property?

A. The conversation I have detailed, was the first after this discovery and at the same time.

Q. You had no conversation with him about the property, or about the bond and lease, until after this discovery?

A. No, sir.

Q. You knew nothing about Dye taking any interest in the matter, until Fuston had told you that he had been there?

A. That was the first.

Q. After this strike, you say you returned home on Friday evening, and took a man by the name of Millington up there with some timber; that was after the strike in August that Fuston had told you about?

A. Yes, sir.

Q. You had obtained the bond and lease on the 5th day of June, hadn't you?

A. On the 5th day of June.

Q. Now when he told you that it was not of sufficient value to warrant him in working it, and that he had allowed his time to expire, and when you had the balance of that conversation with him,

which you have given on your direct examination, who was present?

395 A. That first conversation?

Q. The conversation in which Dye said those things.

A. The first conversation or the last?

Q. I refer to the conversation when you say you took Millington up there after the strike in August?

A. The conversation was on the following Monday.

Q. Who was there?

A. Mr. Dye, Mr. Crary, myself.

Q. Who else was there?

A. Nobody, not while we had our conversation. Mr. Fuston was working in the tunnel.

Q. What did you understand him to mean by allowing his time to expire?

A. His redemption or appeal.

Q. Alexander was not present then, was he?

A. No, sir.

Q. When was the conversation when Alexander was present, with reference to this first conversation?

A. Sometime in the latter part of October.

Q. How long before you paid the $1,500?

A. Ten days or two weeks—a couple of weeks.

Q. Was Heiniman there?

A. He was.

Q. That was on the mine, wasn't it?

A. That was on the mine; yes, sir.

Q. You heard all the conversation between Heiniman and Dye at the mine, on this occasion I have just asked you, when the Scranton was mentioned?

A. I heard the most of it.

Q. What did Dye say about letting his time elapse, state his exact language?

A. I don't think I would attempt to repeat the exact language.

396 Q. As near as you can?

A. That is what I understood him to say.

Q. That is what you understood from what he said?

A. Yes, sir.

Q. State as near as you can, about what he said about making no further claims to the property?

A. He said that there would be no one outside of himself that could make any claim, and that he had allowed his time to elapse, his redemption. It was also spoken there, that it was taken from him by this way of attachment.

Q. Heiniman made the inquiry, which called out these responses from Dye, did he?

A. He did.

Q. How do you know what purpose he had in making those inquiries?

A. He told me.

Q. When did he tell you, tell you there or somewhere else.
A. He said that when Dye came over, he was going to ask him right out.
Q. You or Heiniman had already procured an abstract of title to the property, hadn't you?
A. As far as the records of Lincoln County were concerned.
Q. And you had sent a lawyer by the name of Lund over to Socorro to examine the records of the District Court with reference to this attachment suit, hadn't you?
A. His answer was that he had not examined the records of the District Court, but only of the County Clerk's.

397 Q. Did you tell Dye or Heiniman tell him, that you were relying upon his representations with reference to his claim to this property, and that you would not purchase it if he made any claim to it, or anything to that effect?
A. I never told Dye any thing to that effect.
Q. Did you ever hear him told this at that or at any other time?
A. I never did.
Q. Did you have any reason to believe that Dye understood why you were making these inquiries of him?
A. No more than his word, that he made no claim.
Q. You never told him that you were relying upon his representations?
A. I never did.
Q. Or anything of that kind?
A. No.
Q. Are your statement, that you would not have paid the $1500, or done this development work, based upon subsequent occurrences, or what passed through your mind before you did it?
A. I never knowingly touch a property, where there is a prospect of any trouble with the title.
Q. That is to say, if you know there is going to be any trouble about it, you won't touch it?
A. If there is any prospect of trouble.
Q. What interest has Jones Taliaferro acquired in this property since you paid him the $1500 under the bond and lease?
A. I can hardly remember the exact fraction—he gets one-third of one-half of five-sixths.
Q. Is the deed of record?
A. It is.

398 Q. What has Charles Spence acquired in the property, since the suit was brought?
A. The same.
Q. Then you and Charles Spence and Jones Taliaferro, each claim one-third of one-half of five-sixths?
A. Yes, sir.

(Signed.) HARRY C. CRARY.

(Recess until tomorrow morning, June 13, at 8:30.)

399 And afterwards, *on* to wit:—on the twenty-ninth day of November, A. D., 1905, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors in the above entitled cause, which said assignment of errors was and is in words and figures, following to wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1113.

BENJAMIN H. DYE ET AL., Pl't'ffs & Appellees,
vs.
H. C. CRARY ET AL., Def'ts & Appellants.

Appeal from District Court, Socorro County.

Assignment of Errors.

Now come the appellants in the above entitled cause and assign as errors, committed by the court below, on the trial of this cause, the following, to-wit:—

1. The court erred in refusing to instruct the jury to find the defendants not guilty at the conclusion of *of* Plaintiffs' tettimony.
2. The court erred in refusing to instruct the jury to find the defendants not guilty at the conclusion of all the testimony in this case.
3. The Court erred at the conclusion of all the testimony in this case in withdrawing the same from the consideration of the jury and peremptorily instructing said jury to find a verdict in favor of the plaintiffs.
4. The court erred in striking out all of the testimony admitted on behalf of the defendants in this case.
5. The court erred in excluding proper evidence offered on behalf of the defendants on the trial of this case.

400 6. The court erred in admitting improper evidence offered on behalf of the plaintiffs on the trial of this case.

7. The court erred in overruling the motion for a new trial made by the defendants in this case. (Tr. P. 39.)
8. The court erred in holding that the judgment in the attachment suit of Taliaferro *vs.* Dye, in evidence in this case was null and void.
9. The court erred in admitting extrinsic evidence offered by the plaintiffs on the trial of this case in determining whether or not said judgment was subject to collateral attack on the trial of this case, and in refusing to hold that the question of such collateral attack should be decided alone by the inspection of the judgment roll of such attachment suit.
10. The court erred in rejecting evidence offered on the trial of this case by the defendants, showing the grounds on which the court acted in issuing the alias writ of attachment in said suit of Taliaferro *vs.* Dye.

11. The court erred in holding that the statutes of the Territory of New Mexico, did not authorize the issuance of an alias writ of attachment.

12. The court erred in holding on the trial of this case that even though the court in said attachment suit of Taliaferro *vs.* Dye, had passed on the alias writ of attachment and held that the property seized under such alias writ was lawfully in the possession of the court and could lawfully be sold, yet that such judgment and decision could be reached on a collateral attack on such judgment and decision.

13. The court erred in holding that even though the judgment roll was silent as to whether or not alias affidavit and alias bond had been filed in said attachment suit of Taliaferro *vs.* Dye, before said alias writ was issued, yet that presumption that such alias affidavit and alias bond had been duly filed should not be in-
401 dulged in support of the judgment and sale of property under such alias writ of attachment, as against the collateral attack made upon such judgment and sale in this case.

14. The court erred in holding that under all the facts and circumstances in evidence in this case, the plaintiffs were not estopped to maintain the suit against the defendants in this case.

15. The court erred in refusing to instruct the jury to find the defendants not guilty in this case, on the ground that plaintiff Dye had estopped himself and his privy to maintain this suit against the defendants.

16. The court erred in striking out the testimony adduced by defendants in this case tending to prove that plaintiff B. H. Dye, had abandoned his interest in the mining claim in question in this case.

17. The court erred in striking out the testimony adduced by the defendants in this case tending to prove that B. H. Dye, plaintiff, below, had elected to abide by the result of said attachment suit of Taliaferro *vs.* Dye and the sale of the property involved in this suit thereunder, and to accept the benefit of the payment of the debt and judgment due said Taliaferro for said Attachment suit, by the sale of said property.

H. B. FERGUSSON,
Attorney for Appellants.

Which said assignment of errors was and is endorsed as follows to-wit: "No. 1113—Supreme Court of the Territory of New Mexico—B. H. Dye, *et al., vs. C. H.* Crary, *et al.*,—Assignment of Errors,—Filed in my office this Nov. 29, 1905, José D. Sena, Clerk,—H. B. Fergusson, Att'y for Appellants."

And Afterwards, on to wit—At a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fé the seat of Government on the first Wednesday after the first Monday in January, A. D., 1906, the same being the third day of
402 January, A. D., 1906 on the fourteenth day of the said regular term, the same being the 22nd day of January A. D.,

1906 the following among other proceedings were had and entered of record, following to-wit:—

No. 1113.

BENJAMIN H. DYE ET AL., Appellees,
vs.
H. C. CRARY ET AL., Appellants.

Appeal from District Court, Socorro County.

This cause coming on to be heard, upon the transcript of record, assignment of errors and briefs of counsel, was argued by H. B. Fergusson, Esq. for appellants, and William B. Childers, Esq. for Appellees, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, *on* to wit, on the twenty-sixth day of the said Regular term of the said Supreme Court, the same being Friday the 2nd day of March, A. D., 1906, the following among other proceedings were had and entered of record, as follows to wit:—

No. 1113.

BENJAMIN H. DYE ET AL., Appellees,
vs.
H. C. CRARY ET AL., Appellants.

Appeal from District Court, Socorro County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Edward A. Mann, Associate Justices Pope and Abbott, concurring, and Chief Justice Mills and Associate Justice McFie, dissenting, affirming the judgment of court below for reasons stated in the opinion of the court on file; It is therefore considered and adjudged by the court that the judgment of the District Court in and for the County of Socorro, whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith, It is considered and adjudged by the court that the appellee herein have and recover from said appellants an undivided five-sixth- of the said "Compromise Mine," described in the complaint of said cause, and situated on the easterly slope of Baxter Mountain, and on the westerly side of Baxter Gulch on said mountain, in the White Oaks mining district in the county of Lincoln, and Territory of New Mexico, and more particularly described in said complaint, and that plaintiff have and recover *their* costs in this behalf expended to be taxed and that execution issue in favor of said plaintiff and appellee for possession of said property.

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And afterwards, *on* to wit on the 28th day of August A. D., 1906, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an affidavit of value in the above entitled cause, which said affidavit of value was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1113.

BENJAMIN H. DYE ET AL., Appellees,
vs.
H. C. CRARY ET AL., Appellants.

Appeal from District Court, Socorro County.

Affidavit of Value.

H. B. Fergusson, of lawful age, being duly sworn, on his oath says that he is one of the defendants in the above entitled
404 cause, and that the matter in dispute in said cause, exclusive of all costs, exceeds the sum of five thousand dollars.

(Signed) H. B. FERGURRON.

Subscribed and sworn to before me this the 28th day of August A. D. 1906.

(Signed) JOSE D. SENA,
[SEAL.] *Clerk Supreme Court of New Mexico.*

Which said affidavit of value was endorsed in words and figures as follows to wit: "No. 1113—In the Supreme Court of the Territory of New Mexico—January Term, A. D., 1906,—Benjamin H. Dye, *et al.* appellees, *vs.* H. C. Crary, *et al.*, Appellants,—Affidavit of Value—Filed in my office this Aug. 28th, 1906, Jose D. Sena, Clerk."

And afterwards *on* to wit: on the 28th day of August there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for statement of facts which said motion for a statement of facts was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1113.

BENJAMIN H. DYE ET AL., Plaintiffs and Appellees,
vs.
H. C. CRARY ET AL., Defendants and Appellants.

Appeal from District Court, Socorro County, on Change of Venue from Lincoln County.

Hon. W. B. Childers, Attorney for Plaintiffs and Appellees:

Take notice that I shall request the Court to make additional finding of facts in the above entitled cause for the purpose of a writ of error in said cause from the Supreme Court of the Territory of New Mexico to the Supreme Court of the United States, at its sitting in the adjourned session, on the 28th day of August, 1906,
405 at 10 o'clock in the forenoon of that day, at Santa Fé, New Mexico, a copy of said motion and proposed finding of facts I hand you attached hereto.

(Signed) H. B. FERGUSSON,
Attorney for Defendants & Appellants.

A copy of the above notice, together with a copy of the attached proposed additional finding of facts, was by the undersigned, this Aug. 20th, 1906, properly mailed to W. B. Childers, Esq., attorney for plaintiffs and appellees in this couse.

H. B. FERGUSSON,
Attorney for Defendants & Appellants.

Which said notice of motion for ftatements of fact was endorsed as follows to wit: "No. 1113—In the Supreme Court of the Territory of New Mexico,—January Term A. D., 1906,—Benjamin H. Dye, *et al.*, Appellees, *vs.* H. C. Crary, *et al.*, Appellants,—Notice of Motion for findings of fact.—Filed in my office this Aug. 27, 1906, Jose D. Sena, Clerk."

And afterwards, on to wit, on the 28th day of August A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico requested findings of fact, which said requested findings of fact was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1113.

BENJAMIN H. DYE ET AL., Plaintiffs and Appellees,
vs.
H. C. CRARY ET AL., Defendants & Appellants.

Appeal from District Court, Socorro County, on Change of Venue from Lincoln County.

Come now the defendants and appellants, in view of the
406 action — this honorable Court, herefofore taken at this Term of Court, in affirming the judgment and decision of the Court below in this Case, entering final judgment against the defendants, and in order that the questions of law and the decision of this Honorable Court may be fully reviewed by the Supreme Court of the United States, and respectfully requests this Honorable Court to find and certify, for the purposes of such review, in addition to the facts already found by this Court in its statement of facts and in its opinion, the following facts, to-wit:

1. Defendants' witness, W. R. Fuston, did communicate to Heiniman & Crary, through H. C. Crary, a member of the partnership of Heiniman & Crary, the latter part of August 1900, plaintiff Dye's statement to said witness Fuston, made a few days prior to such communication, to the effect that he (said Dye) once owned an interest in the claim, and that Mr. Taliaferro attached the property, and it was sold at Sheriff's sale to satisfy the debt; and that he (Dye) was glad that they (Heiniman & Crary) had made a strike on the property; while he had at that time no interest in the property, but it would enchance the value of his property adjoining (p. pp. 173-4, 177-8).

2. Heiniman & Crary, through their attorney, R. E. Lund, had the title of Dye to his interest in the mine in question examined, and received the report of their said attorney, soon after the rich strike, to wit, in September 1900.

3. The last conversation between Dye and Heiniman & Crary, on the mine in question, when Heiniman informed Dye that the time had nearly arrived when under their option they must pay Taliaferro for the former Dye interest in the mine, and asked him (Dye), in effect, if he knew anything derogatory to such title, took place on October 23rd, 1900, and after such examination of, and report on, such title by R. E. Lund, attorney.

4. Heiniman & Crary both testified that they would not have so purchased the property in question in this case but for the
407 assurance and conduct of Dye to the effect that he would in the future not make claim to the said property.

5. Plaintiff Dye began soon after the first day of October 1900 to question in his own mind the regularity, or possible void

character, of the sale of his interest in said Compromise mine under the attachment proceedings in evidence in this case.

6. The first intimation that Heiniman & Crary had of Dye's claim to said property, or of anything contrary to his said assurance, was the service of process on them in the ejectment suit on the 17th day of January, 1901.

7. Dye visited the workings being conducted on said mine by Heiniman & Crary, after Nov. 1st, 1900, when Heiniman & Crary took up their option by paying the purchase price, the same as he had done before, until the work was discontinued on the service of said process on January 17th, 1901.

8. Dye had knowledge of the option given to purchase the said mining interest by Jones Taliaferro, the purchaser of the said property, to Heiniman and Crary, from the time of the entry into possession of said property under said option by Heiniman & Crary early in June, 1900; of the development work done on said property by Heiniman & Crary by personal inspection thereof; of the rich strike on said property under said development work as soon as it was made, of the time and other terms of said option; and frequently visited said property and inspected said development work while it was in progress.

9. Dye has been a practicing lawyer in Lincoln County, New Mexico since 1883.

And the defendants and appellants hereby present the foregoing to this Honorable Court, and pray the Court to certify that the same are facts established by the evidence in this case, to the end that defendants may be enabled to present fully to the Supreme Court of the United States such question of law as defendants may desire to have reviewed by that august tribunal; and defendants will ever pray &c.

(Signed) H. B. FERGUSSON,
Attorney for Defendants & Appellants.

408 Citation from the evidence in support of the findings of fact requested.

1. Witness W. R. Fuston, Tr. 174, 178-9.
2. E. Heiniman, Tr. 205; R. E. Lund, Tr. 234.
3. E. Heiniman, Tr. 191.
4. E. Heiniman, Tr. 192, 195-6.
   H. C. Crary, Tr. 219-220.
5. B. H. Dye, Tr. 288, 289, 290, 291, 292.
   Jones Taliaferro, Tr. 241.
6. E. Heiniman, Tr. 193.
   H. C. Crary, Tr. 222.
7. E. Heiniman, Tr. 192-4.
   H. C. Crary, Tr. 215-222.
8. B. H. Dye, Tr. 280.

Which said requested findings of fact was duly endorsed as follows to wit: "No. 1113—In the Supreme Court of the Territory of New Mexico—January Term, A. D., 1906,—Benjamin H. Dye, *et al.*, Appellees *vs.* H. C. Crary, *et al.* appellants,—Requested Findings of fact—Filed in my office this Aug. 28, 1906, José D. Sena, Clerk.

And afterwards, on to wit, on the 27th day of August A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an Assignment of errors on writ of error to the Supreme Court of the United States, which said assignment of errors was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1113.

BENJAMIN H. DYE ET AL., Defendants in Error,
vs.
H. C. CRARY ET AL., Plaintiffs in Error.

Error to Supreme Court of the Territory of New Mexico.

Assignment of Errors on Writ of Error to Supreme Court of U. S.

Now comes the Plaintiffs in error in the above entitled
409 cause and assign the following errors appearing in the record in this case in the action and in the opinions of the Supreme Court of the Territory of New ——, to wit:

1. The court erred in overruling the motion for a rehearing in this cause made by the plaintiffs in error herein.

2. The court erred in its opinion in apperently holding that the use of the qwords "original attachment" in the New Mexico statute for attachment forbade the issuance of an alias writ of attachment.

3. The court erred in holding in its opinion that the New Mexico attachment statute in force at that time did not authorize the issuance of an alias writ of attachment.

4. The court erred in its opinion in holding that the record in said attachment suit of Taliaferro *vs.* Dye shows that "no additional of other affidavit or bond was filed" before the alias writ was filed, said record being wholly silent on that point.

5. The court erred in its opinion in applying the doctrine of the presumption indulged in support of a judgment of a court of record under collateral attack, and in misconstruing and misapplying the decision of the court in Voorhees *vs.* The Bank, 10 Peters, 469.

6. The court erred in its opinion in failing to distinguish and apply the difference between a direct attack and a collateral attack upon the judgment of a court of record.

7. The court erred in its opinion in refusing to hold, the record being silent on the point, that the law conclusively presumes, under a collateral attack, that an alias affidavit and an alias bond were filed prior to the issuance of the alias writ of attachment.

8. The Court erred in its opinion in ignoring and failing to decide the point raised in the trial court, and urged before the Supreme Court of the Territory of New Mexico, by the plaintiffs in error here, to-wit; that the court in said attachment suit, having held that said

alias writ of attachment was its lawful writ, properly issued and served, and the property in question here lawfully attached thereunder, and having thereupon entered judgment for the plain-
410 tiff and sustained said attachment and ordered the sale of said property to satisfy said judgment, and said property having been duly sold and said judgment duly satisfied, and the purchaser of said property having been put in possession thereof, and said attachment suit having been fully ended and become a matter of record; and no direct attack having been made on said attachment suit and judgment, and no offer to redeem said property from such sale having been made, and such judgment and sale having become final and not subject to direct attack, that the action of the court in said attachment suit in sustaining the sufficiency of its own process, and holding that it acquired jurisdiction of the *rem*,—even if erroneous on direct attack, is not such an error as can be corrected on collateral attack.

9. The Court erred in ignoring and failing to pass upon the point urged in both courts below by the plaintiffs in error here, to-wit that, the court in said attachment suit having adjudged that the attaching of the *rem* in said suit was lawful and sufficient, and having entered final judgment, it will be presumed in support of said judgment, on collateral attack, that, the record in such attachment suit being silent on the subject, the court had evidence before it of all the facts necessary to justify its said action and judgment; and that to presume that an alias affidavit, and an alias bond had been filed; or that the court took evidence as to the sufficiency of the bond filed, and as to the then existence of the grounds for attachment set forth in the attachment affidavit, and further publication of notice, would, either, have been a presumption consistent with and in no wise contradictory of, the record in said attachment suit, as it stands in said suit, and as it appears in the transcript in this case.

10. The court erred in admitting in evidence in this case on behalf of the plaintiffs (Defendants in error here) plaintiff's Exhibit "O" being extracts from the cost book of the Clerk of the Court
411 which tried said attachment suit, and not a part of the judgment roll; and in admitting the testimony of the witnesses for plaintiffs (Defendants in error here), W. B. Thompson, John E. Griffith, Ruby, Berry, J. E. Wharton, and W. M. Driscoll, the testimony o*g* each of said witnesses being extrinsic evidence touching the judgment roll and record of the said attachment suit, admitted in this suit, which is a collateral attack on said attachment suit.

11. The court erred in its decision sustaining the collateral attack in this sentence: "The original writ of attachment would be returnable at the next term of court, while the alias writ of attachment might not be issued until long after such term."

12. The court erred in the following sentence in its opinion sustaining the collateral attack, to-wit:—"The position of appellees that section 2727, Comp. Laws, gives the court jurisdiction of the property of the defendant from and after the issuance of the writ is tenable only so far as it relates to the property levied upon," in this, that the true construction of said section 2727 of the Compiled Laws (1897)

of the Territory of New Mexico, as held in the dissenting opinion in this case and as contended by appellees (Plaintiffs in error here) is that said section gave the court jurisdiction, after the first writ was found ineffective, to seize any other property of the defendant found in its Territorial jurisdiction, by an alias writ, if, in its discretion, such alias writ was deemed necessary, to enforce its jurisdiction of the subject matter, viz:—the collateral of a debt by means of the attachment and sale of the property of a non-resident debtor found in its Territorial Jurisdiction.

13. The court having found as a fact that plaintiff Dye, learned, upon his return to White Oaks, in April, 1899, of such attachment proceedings, and that the mine in question had been sold thereunder to the attachment plaintiff, Taliaferro, erred in failing to find also the admitted fact that Dye as a practicing lawyer and an enrolled member of the bar of the court which had approved said attachment proceedings and ordered said sale, as well as in his capacity
412 of attachment defendant, had ready and complete means of actual knowledge of all that an inspection of such attachment proceedings would have disclosed.

14. The court erred in failing to find as a fact, admitted by Dye, that he learned soon after the entry of Heiniman & Crary into possession of said mine on June 5th, 1900 under their option to develop and purchase said mine from Taliaferro, of such entry into possession and beginning of development work; in failing to find as facts that said Dye was working on a mine of his own just across a gulch from the workings of Heiniman & Crary, and in plain view of the same; that he (Dye) from that time kept himself informed by frequent conversations with Heiniman & Crary, of the progress of such development work, the terms and conditions of said option and contract of Heiniman & Crary with Taliaferro, the time (six months) when said option would expire, and the amount ($1,500) of purchase money which Heiniman & Crary would have to pay to acquire said mine in addition to the expense of their development work; that he (Dye) learned of, and personally inspected, the strike of rich ore made by Heiniman & Crary under such development work in the latter part of August 1900, and thenceforth frequently visited such workings up to the service of process in this suit on Heiniman and Crary on Jan. 17th, 1901, at which date Heiniman & Crary ceased said development work on said mine they had nearly three months previously paid for under said option; that during the whole of this time Dye frequently, in various conversations with Heiniman & Crary themselves, expressed his belief that their strike was a very valuable one, his hope that they would make a million out of it, and his belief that his (Dye's) adjoining property would be greatly benefited thereby—even though the property they were developing had once been his, but he had lost it because of his proverty by means of Taliaferro's attachment suit.

15. The court erred in failing to find as a fact, which is
413 admitted by Dye, that he (Dye) begun to question in his own mind the validity of said attachment proceedings, and

whether he might void and evade them, as early as about the first of October, 1900; and failed and neglected, either himself, or by attorney, to at once investigate said attachment proceedings, and failed and neglected to coomunicate to Heiniman & Crary such questions in his own mind, or to give them any warning of the loss that might befall them, in case he should attack said attachment suit and sale.

16. The court, having found in its opinion that Dye did submit to his attorney, on November 20th, 1900, the question whether said attachment proceedings were valid and dinding on him or not, erred in failing to find also as a fact that said Dye failed and neglected to communicate to Heiniman & Crary the fact that he had submitted to legal scrutin*i*ty the validity of the attachment suit on which their title to the mine in question was based, but knowingly stood by and permitted them to continue their development and expenditure for nearly two months thereafter.

17. The court erred in failing to find as a fact that on December 4th, 1900, said Dye learned from his attorney that in the opinion of his said attorney the said attachment suit and sale were null and void, and that he (Dye) could recover said mine notwithstanding said attachment suit and sale; and that said Dye thereupon immediately directed his said attorney to institute this suit in ejectment; and yet Dye failed and neglected to communicate to Heiniman & Crary the fact that this suit had, by letter, on Dec. 4th, 1900, been ordered by him, and failed and neglected to warn Heiniman & Crary that their expenditures in further developing said mine after said Dec. 4th, while valuable to the mine, might be wasted so far as they were concerned.

18. The court having found it to be a fact that Heiniman & Crary took advantage of a visit of said Dye to said mine and their development work thereon, on Oct. 23rd, 1900, to state to Him (Dye) that there were about to make payment of the purchase price named in their option on said mine, and to ask him (Dye), and did then and there ask him, if he knew of any reason why the
414 title to the mine they were about to purchase was not all right, and that Dye replied that beyond an overlap on the surface on one side, that 'there could be no other claimant, unless it was him, and he had allowed his time to lapse, and made no further claims to the property." erred in not holding, as a matter of law, that said language of Dye, was tantamount to an assurance and promise on Dye's part, to Heiniman & Crary, that if they consum-ated their purchase he (Dye) would not in the future assert any possible claim of his against them, and that*refore* he *es* estop-ed to maintain this suit.

19. The court erred in failing to find as a fact that plaintiff Dye, from and after about October 1st, 1900, concealed from said Heiniman & Crary his doubts as to the validity of said attachment sale and that he might try to have the same annulled; and also concealed from and after said 4th day of December, 1900 the fact that he had on said last named date ordered the commencement of a suit to recover said property, though he well knew of the large expenditure

said Heiniman & Crary were continiously making on said mine from said date in October and from said date in December.

20. The court erred in affirming the judgment of the court below.

Wherefore, and for divers other errors appearing in said record, the plaintiff in error prays that the judgment below in this cause be in all things reversed, and set aside and that such further proceedings be had herein as may be agreeable to law.

(Signed) H. B. FERGUSSON,
Attorney for Plaintiffs in Error.

Which said assignment of errors on writ of error to the United States Supreme Court was endorsed as follows: "No. 1113—Supreme Court, of the Territory of New Mexico,—B. H. Dye, *et al.*, *vs.* H. C. Crary, *et al.*, Assignment of errors on writ of error to United States Supreme Court,—Filed in my Office this Aug. 27, 1906 José D. Sena, Clerk—H. B. Fergusson Attorney for H. C. Crary *et al.*, Plaintiffs in error."

415 And afterwards, *on* to wit:—at the said regular term of the said Supreme Court of the Territory of New Mexico, on the thirtieth day of the said regular term, the same being the 28th day of August, A. D., 1906, the following among other proceedings were had and entered of record, *following* to wit:—

No. 1113.

BENJAMIN H. DYE ET AL., Appellee,
vs.
H. C. CRARY ET AL., Appellant.

Appeal from District Court, Socorro County.

This cause coming on to be heard upon the motion of appellants for additional findings of fact in the above entitled cause, and the court having had said motion under advisement, the court overrules the same on the ground that this court is of the opinion that as the whole evidence with the record goes on writ of error to the Supreme Court of the United States, the findings of facts requested in addition to those incidentally found by the court in its opinion, is unnecessary, Therefore it is considered and adjudged by the court that the motion for additional findings of fact hereby is overruled and denied for the reason above specified. To which action of the court in overruling the motion and refusing to find the facts requested *by* the appellants, then and there prayed an exception which said exception was duly allowed by the court.

416 And afterwards, *on* to wit on the 10th day of September, A. D., 1906, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a cost bond on writ of error to the United States Supreme Court, which said cost bond was and is in words and figures following to wit:—

In the Supreme Court of the United States.

H. C. CRARY ET AL., Plaintiffs in Error,
vs.
B. H. DYE ET AL., Defendants in Error.

Know all men by these presents that we, Jones Taliaferro, for himself and on behalf of his Co-Plaintiffs in error, as principal, and Charles D. Mayer and S. C. Wiener, as sureties, of the county of Lincoln and Territory of New Mexico are held and firmly bound unto Benjamin H. Dye, and William B. Childers in the sum of five hundred ($500.00) dollars, lawful money of the United States to be paid to them and their respective executors, administrators, and successors; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 7th day of September, A. D., 1906.

Whereas the above-named Jones Taliaferro and his Co-plaintiffs in error have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled action by the Supreme Court of the Territory of New Mexico:

Now, Therefore, the condition of this obligation is such that if the above named Jones Taliaferro and his Co-plaintiffs in error shall prosecute their said writ of error to effect and answer all costs if they shall fail to make — their plea, then this obligation shall be void otherwise to remain in full force and virtue.

(Signed) JONES TALIAFERRO. [SEAL.]
CHARLES D. MAYER. [SEAL.]
D. C. WIENER. [SEAL.]

Witness:
FRANK J. SAGER.

417 TERRITORY OF NEW MEXICO, *County of Lincoln:*

On this 7th day of September A. D., 1906, before me came personally Jones Taliaferro, and Charles D. Myer and S. C. Wiener, who are respectively to me known to be the persons described in and who executed the foregoing instrument of writing as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purpose therein set forth.

And said Charles D. Mayer and S. C. Wiener, being respectively by me duly sworn says, each for himself and not one for the other, that he is a resident and householder of said county of Lincoln, and that he is worth the sum of five hundred ($500.00) dollars over and above his just debts and legal liabilities and property exempt from execution.

(Signed) JONES TALIAFERRO.
CHARLES D. MAYER.
S. C. WIENER.

Subscribed and sworn to before me this 7th day of September A. D. 1906.

(Signed) FRANK J. SAGER,
[SEAL.] *Notary Public.*

The above and foregoing bond is hereby approved both as to form and Sufficiency of sureties thereon.

JOHN R. McFIE,
Associate Justice Supreme Court of New Mexico.

Which said bond was endorsed as follows "No. 1113, Supreme Court of the Territory of New Mexico, Dye *et al., vs.* Crary *et al.*,—Bond on writ of error,—Filed in my office Sept. 10, 1906. Jose D. Sena, Clerk."

And afterwards, *on* to wit, on the second day of March, A. D., 1906 there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an opinion by the court, which said opinion by the court was and is in words and figures following to wit.

418 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1113.

BENJAMIN H. DYE ET AL., Appellees,
vs.
H. C. CRARY ET AL., Appellants.

Appeal from District Court, Socorro County.

H. B. Fergusson, and Elfego Baca for Appellants.
W. B. Childers, for Appellees.

Syllabus.

1. Matters of law determined upon a former appeal become the settled law of the case, are binding upon the Court and the litigants and cannot be reviewed on second appeal.
2. In order to establish an equitable estoppel against one asserting his title to real property, the party attempting to raise it must show either an actual fraudulent representation or concealment or such negligence as would amount to a fraud in law, and that the party setting up such estoppel was actually misled thereby to injury.
3. One who buys an interest in an u*pan*tented mining claim at a void judicial sale and pays the portion of the assessment work due from the judgment debtor before the time to redeem has fully expired taking a receipt therefor only, is not subrogated to the rights of the party seeking the forfeiture, and his payment and its acceptance prevents the forfeiture as against the judgment debtor.

Statement of the Case.

On the twenty-first day of April, 1887, Benjamin H. Dye, John D. Cockrell and Theo. W. Heman located the Compromise lode claim in the White Oaks Mining District, in Lincoln County, New Mexico, the property in dispute in this action. Thereafter the plaintiff B. H. Dye, one of the original locators of said claim, acquired interests by deed and otherwise until he was the owner of five-sixths
419 of said claim, the other one-sixth being the property of the Apex Gold Mining Company, a corporation. On the eighth day of March, 1898, Jones Taliaferro commenced a suit against Dye to recover the amount due on two promissory notes for eighty dollars, and thirty-two dollars and forty seven cents, and interest, respectively, in the District Court of Lincoln County, by attachment, Dye being then absent from the Territory, and the writ of attachment was levied on certain lots in the town of White Oaks, New Mexico, and a tract of land near said town, and notice was given by publication; later an alias writ was issued and the mining claim in controversy levied upon and sold under the alias writ on February eighteenth, 1899, to Jones Taliaferro. At the time of the sale Dye had not paid his share of the assessment work for 1898, which had been done by his co-tenant, The Apex Gold Mining Company, and at the time Taliaferro received the Sheriff's deed and entered into possession of Dye's interest in the mining claim the Apex Company, by T. C. Johns, had advertised for forfeiture, which time would have expired on July fifth, 1899, the period in which Dye might rede-m, on June fifteenth, 1899, Taliaferro paid this money to Johns and took his receipt therefor. Dye returned to the Territory in the latter part of April, 1899, and upon his return learned that the mining claim had been sold by attachment and that Jones Taliaferro was in possession of it as purchaser at such sale. Taliaferro leased to Crary and Heiniman with an option to buy the property, on June fifth 1900; in August, 1900, Crary and Heiniman made the discovery of rich ore and brought the property under their option contract, the deed bearing date October first, 1900, though the price was not paid or the deed delivered until late in November, 1900. Dye in the meantime had taken no steps to ascertain the condition of the attachment proceedings; in fact, he told several parties that he had lost his interest in the Compromise, that it went to pay a debt and that he considered it well sold; during the time the option contract was in operation between Taliaferro and Crary and Heiniman *he* visited the property several times and told both Crary and Heiniman
420 that he had lost his interest in the claim; after the rich discovery was made he told Crary in answer to the direct question that he had no interest in the claim and "wished him well," as Crary expressed it. In the meantime Crary and Heiniman had expended several thousand dollars upon the claim; after making the rich discovery they obtained an abstract of title and employed an attorney to look the title up, including the attachment proceedings and the Sheriff's sale thereunder to Taliaferro; after being

assured by their attorney that the attachment proceedings were regular and the title good, paid Taliaferro the fifteen hundred dollars under the option contract and received a quit-claim deed to the claim. About November twentieth Dye wrote Mr. Childers, an attorney at Law, at Albuquerque, and had him look up the attachment suit, and upon being informed by Childers that the Sheriff's sale under the attachment proceedings and the judgment in that case were void, he and Childers, to whom he had deeded an interest, commenced this suit in ejectment for the possession of the mining claim. After suit was commenced both Crary and Heiniman, the original defendants, sold all their interest in the property and conveyed the same by deed to Jones Taliaferro, Charles Spence and Joseph E. Spence, and afterwards Mr. Harvey B. Fergusson acquired an interest in the property, and one Van Schoick also acquired an interest later, all of the defendants who are now interested having become so since this suit was instituted, and with knowledge of its pendency.

Opinion of the Court.

MANN, *J.:*

1. At the January 1904 term of this Court this case was heard on appeal from the District Court of Socorro County, from a judgment in favor of the defendants and reversed and remanded to that Court for further proceedings in conformity with the opinion in the case. Dye *et al., vs.* Crary *et al.,* 78 Pac. 533.

421 It was held in that opinion that there was no authority for an alias writ of attachment at the time the alias writ was issued in Taliaferro *vs.* Dye, in the District Court of Lincoln County, and that property levied upon under such writ gives the Court no jurisdiction, and that consequently the judgment against Dye in that Court, and the sale of the property in controversy, was absolutely void. The Court having so held, whether right or wrong, it there upon became the law of this case and is controlling upon this Court, so that the question of the validity of the alias writ and the proceedings of the Court thereunder cannot be reviewed here. The evidence being substantially the same.

This Court, speaking through Mr. Justice McFie, in Crary *vs.* Field, 10 N. M., 257, quoted with approval the following language from Phelan *vs.* San Francisco, 20 Cal. 45.

"A previous ruling by the Appellate Court upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits, but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the Court cannot depart, nor the parties relieve themselves."

In Flournoy, *et al., vs.* Bullock, *et al.,* 11 N. M., Mr. Chief Justice Mills, in the opinion of the Court says: "According to well settled principles of law and the decision of this Court, in the case of Crary *vs.* Field, 61 Pac. 118, the former decision of this Court when this case was here before on appeal (Rice *vs.* Schofield, 9 N. M. 314) so

far as it states the law, is the law of the case, and will not be reviewed by this Court on this hearing.

This seems to be the universal rule. Balch *vs.* Hass, 73 Fed. 975; Supervisors *vs.* Kenncott, 94 U. S., 498; *Ex Parte* Sibbald, 12 Peters, 487; Seizer *vs.* Many, 16 How. 97; Corning *et al., vs.* The Troy & Nail Factory, 15 How. 451, 466-*p*; Roberts *vs.* Cooper, 20 How. 467; Durant *vs.* Essex County, 101, U. S., 555; Stewart *vs.* Salamon, 97 U. S. 361.

422 The facts presented with reference to the attachment proceeding*a* are identical with those presented on the former appeal and cannot now be reviewed; the law expressed in the former opinion, so long as it stands unreversed, is the settled law of this case.

2. The next question arising is whether or not defendant Dye is estopped by his actions and conduct from asserting title to the Compromise Mining Claim, the property in dispute, or, in other words, whether his acts have raised against him an equitable estoppel.

Whether certain acts, misrepresentations or silence on the part of a person will raise an equitable estoppel against him from claiming title to real property depends largely upon the circumstances in each individual case, and such a plea is addressed to the conscience of the trial Court, whether in equity and good conscience he should be allowed, under the circumstances, to set up and establish such a claim, True, such an estoppel may be raised in Courts of Law, but the principle is one of equity.

Equitable estoppel is defined as:—"A right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Bigloe on Estoppel (4th Ed.) 445.

"An estoppel (which) presupposes error upon one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." Anderson L. Dict.

"This estoppel arises where one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." 16 Cyc. 722.

Bouvier defines it as an estoppel "such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself." 1st Bouvier (Rowle's Revision) 694.

423 There are, however, certain well defined and essential elements which must enter into the acts, conduct or representations of the party against whom the estoppel is sought to be raised, in order to constitute an equitable estoppel.

"The following elements must be present in order to constitute an estoppel by conduct: 1. There must have been a representation or concealment of material facts. 2. The representation must have

been made with knowledge of tha facts. 3. The party to whom it was made must have been ignorant of the matter. 4. It must have been made with the intention that the other party would act upon it. 5. The other party must have been induced to act upon it. 1st Bouvier (Rowle's Revision) 695; Bigelow on Estoppel, 484.

"In order to constitute an equitable estoppel there must exist a false representation, or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied or acted upon it to his prejudice." 16 C. Y. 726.

Bearing in mind these definitions and elementary principles of the doctrine of equitable estoppel,—Is Dye estopped by his acts and conduct from now asserting his title to the mining claim in controversy?

His acts which are set up as raising an equitable estoppel against him are: 1 Failure to attack the judgment and proceedings in the attachment case, directly, within the time prescribed by law; 2. That he had told strangers to this action, (McIver, Robertson and others) that he had lost his interest in the property; and 3. That he told the original defendants, Crary and Heiniman, before they purchased under the option from Taliaferro, "That there could be no other claimant unless it was himself (Dye), and he had allowed his time to lapse and made no further claims to the property."
424 This in answer to the direct question of Heiniman as to whether the title to this property, the Compromise Mine, was all right. (See deposition of Crary P. 219, Record.)

In treating of this question it must be borne in mind that the sale under the attachment proceedings was absolutely void and that therefore the grantor to Heiniman and Crary had absolutely no title to convey; that such proceedings were matters of record and equally available to Dye, Crary and Heiniman; that all these conversations with Dye took place after Crary and Heiniman took the option from Taliaferro and after the big strike and most of the expenditure upon the claim; that it is undisputed that Dye had no actual knowledge of the *inavility* of the attachment proceedings until after the actual sale from Taliaferro to Crary and Heiniman. The judgment and sale in the attachment case being absolutely void and subject to collateral attack, (Dye *vs.* Crary 78 Pac. 533, it necessarily follows that Dye was under no obligation to attack it directly and his failure to do so was not an abandonement of his rights. It would be folly to say that a judgment was void and subject to collateral attack and then add that because one did so attack it he thereby lost his rights.

The conversation between Dye and the witnesses Robertson, McIvers, Despain, Fuston, Thomas, Alexander and perhaps others, in which Dye stated that he had lost his interest in the Compromise by lapse of time, or by the attachment proceedings, clearly do not constitute an equitable estoppel, for the reason that neither of these witnesses are, nor ever have been interestd in the property in con-

troversy, nor does it appear that the parties claiming the land were told of these conversations, or in any manner acted upon them, or that they came to their knowledge until after this suit was brought, or at most, after Heiniman and Crary purchased from Taliaferro. Moore *vs.* Boyd, 74 Cal. 167; Harvey *vs.* West 87 Ga. 553; Davis *vs.* Davis, 26 Cal. 23.

Dye was not informed that his statements to these witnesses might affect his rights or would be relied upon by anyone. Hackett *vs.* Callender, 32 Vt. 97; Scharman *vs.* Scharman, 58 Neb. 39, Allen *vs.* Shaw, 61 N. H., 95.

425 As to the direct statement from Dye to Heiniman and Crary there is little or no controversy. Mr. Crary says (p. 219 Record): "Mr. Dye was there (at the mine) and Mr. Heiniman asked him, I can hardly remember the exact words, but in substance whether the title to this property, the Compromise Mine, was all right. Mr. Dye replied that there was some drawn ground between it and the Scranton on the side that would belong to the Scranton. It was an over-lap; and that there could be no other claimant, unless it was him, and he had allowed his time to lapse and made no further claims to the property. He also added, I hope you will do well with the property, and make lots of money out of it."

Mr. Heiniman (at page 191 of the record) says: "Mr. Dye visited the mine and while there in presence of Mr. Alexander, and Mr. Crary, I told him that I was about to make the payment for the property in full, and I asked him if he knew of any conflicting claim, or any other claims on the Compromise. He immediately answered there was. The Scranton claim took off about a hundred feet, and he said as to other claims there would be nobody but himself. And he says I have allowed all my time to lapse and I have no claim whatever. With that he wished me success and hoped it would prove a good mine."

Mr. Dye (p. 286 record) says: "I have no doubt it is true that I have told Mr. Heiniman in various conversations that we have had on all manner of subjects that I had at one time owned five-sixths of the Compromise Mine. I have no doubt that I have told him, as I have told anybody else who made it their business to inquire of me, that fact. Q. What fact? A. That I had been the owner of five-sixths of the Compromise Mine, and that it was sold out under attachment in my absence from the Territory."

Granting that the conversation took place as testified by Mr. Heiniman, the most favorable to the defendants, it does not contain many of the essential elements of an equitable estoppel. Dye did not know of his rights; at least, he had no actual knowledge, as

426 shown by the very language attributed to him,—"I have allowed all my time to lapse and have no claim whatever" was a mere statement of his supposed legal rights, and not of a matter of fact. At that time (October 23rd) he had not been advised of his rights by Mr. Childers, and if he made the statement, did so under the impression and belief that the attachment proceedings were regular and valid.

"An admission, in order to constitute an estoppel, must relate to

an admission of fact, and a person will not be estopped by an admission as to the law." 16 Cys 756. Citing: English *vs.* Dycus, 8 Ken. L. Rep. 331; Brewster *vs.* Stryke, 2 N. Y. 19. Crawford *vs.* Lockwood, 9 How. Pr. (N. Y.) 547; Daub *vs.* Northern Pac. Ry. Co., 18 Fed. 625.

In Huffman *vs.* Nixon, (Mo.) 75, Am. St. Rep. 454, Mr. Justice Robinson, in delivering the opinion of the Court at Page 459-60, says: "As to the two remaining contentions of defendant (and which judging from the briefs filed herein must have been the controlling question, in the mind of the trial Court, in the making of its judgment—First, that the sheriff sold and plaintiff bought only the equity of redemption of J. B. Kelsey in the land in controversy, and second, that he should now be estopped to assail the deed of trust conveying the land, on account of his declaration and conduct, and the answer filed by him in the Knoop case recognizing its validity notwithstanding the Court may think and find the deed of trust in fact to have been fraudulent in its inception, we have this to say: The proof shows that the sale was made in the ordinary way and that the sheriff sold all the right, title, and interest of the execution defendant in the land. The sheriff simply acted under and in conformity to the statute, and in virtue of the judgment of the Court, and the law under which he acted conveyed all the interest and estate of the execution defendant in the lands sold. If the land in fact was subject to a prior valu*e* deed of trust (regardless of the manner
427 of the sale), the purchaser would have only bought the equity of redemption of the original grantor, and execution defendant, while, on the other hand, if the sale had been made subject to the so-called deed of trust in express terms and the same should afterwards be discovered fraudulent, and without regard to what the execution purchaser thought of it, at the time of the sale, or what he afterward said or offered to do, by the answer in the suit of Koop against the Kellys, Nixon, and himself in 1892, when Koop attempted to have the sale set aside, it could and did not affect the interest purchased by him, and he cannot now be estopped by what was done or said from setting up the fraudulent origin and character of the deed of trust by those who have lost nothing by his belief, declaration or answer filed."

If Dye had no knowledge of the actual character of the proceedings against him and that they were void for want of jurisdiction, then there could have been no fraudulent representation or concealment on his part, when he had the conversation with Crary and Heiniman.

In Brant *vs.* Virginia Coal & Iron Co., 2 *et al.*, 93 U. S., 326, Mr. Justice Field (at page 335) says: "It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to con-tructive fraud, by which another had been misled to his injury. 'In all this class of cases' says Story 'the doctrcine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And

therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud.' 1 Story's Eq.
428 391 to the same purpose is the language of the adjudged cases."

And on page 337,—"It is also essential for its application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convinient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. Crest *vs.* Jack, 3 Wates, 240; Knauff *vs.* Thompson, 4 Harris, 361."

In Henshaw *vs.* Bissell, 18 Wall., 255, the same Judge says: (P. 271) "An estoppel *in pais* is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitide in his conduct which has mislead others to their injury. *Conduct or declarations founded upon ignorance of one's rights have no such ingredient*, and seldom work any such result. There are cases, it is true, where declarations may be made under such circumstances that the party will be estopped from denying any knowledge of his rights; but there are exceptional and do not affect the correctness of the general rule as stated." Smith *vs.* Sprague, 119 Mich. 148, (75 Am. St. Rep. 384).

Nor can it be said that Dye was guilty of such negligence as would amount to a fraud in law. As soon as he discovered the invalidity of the judgment and sale of his property, he immediately brought this suit. It may be said that Dye had constructive notice of the invalidity of the proceedings, but that contention acts as a two edged sword and if he is charged with notice, how much more so were the defendants, Crary and Heiniman, the proposed purchasers from Taliaferro? It seems also to be a well settled rule of law that where all parties have an equal opportunity to determine the true facts there is no estoppel. 16 Cyc. 741. Strum *vs.* Baker, 150, U. S., 312; Brant vs. Virginia Coal Co., 93 U. S., 326.

429 Another essential element of equitable estoppel in this case is lacking, in that Crary and Heiniman did not rely upon the statements of Dye as to the condition of the title to the Compromise Mine. The evidence shows that they procured an abstract of the title and employed an attorney to examine these very proceedings and relied at least in part, upon his report. I quote from pages 205-6 of the record, Mr. Heiniman being on the stand. "Q. What report did your attorney make to you about that? A. He told me that he examined the record carefully, and paid the Clerk $4.00 to assist him in going through the records, *and he reported to me that*

all proceedings of this sheriff's sale was regular and that everything was of record and that so far as that was concerned, I would be perfectly safe to handle the property." Now, when you came to handling the property and making this payment, did you rely upon Dye's statement to you, or the opinion of your attorney and this abstract? A. *I relied upon all these.*"

"It is an essential element of equitable estoppel that the person invoking it has been influenced by and relied on the representations or conduct of the person sought to be estopped; but in all cases the representation or conduct must of itself have been sufficient to warrant the action of the party setting up the estoppel, and if notwithstanding such representation or conduct he was still obliged to inquire for the existence of other facts and to rely upon them also to sustain the course of action adopted, he cannot claim that the conduct of the other party was the cause of his action, and no estoppel will arise." 16 Cyc. 736, Citing: McMaster *vs.* Insurance Co. of N. Am. 55 N. Y. 222; Deer Hodge Bk. *vs.* Hope Min. Co. 3 Mont. 146; First National Bank *vs.* Peetz, 186 Pa. St. 204; 11 Am. & Eng. Ency. of Law, 439.

3. Defendants contend that Dye had forfeited his rights to his co-owner Johns, and that Taliaferro, the purchaser at the Sheriff's sale under the attachment proceedings, by *b*aying to Johns the amount due from Dye, for the assessment work of 1898, succeeded thereby to *to* Johns' rights and became the owner by reason of the forfeiture. They contend that Sec. 3126 C. L. subrogates them upon the payment to Johns, to his rights, But that section contemplates a *valid judicial sale,* and this sale being void would give them no such rights, even if their contention as to that be correct. But we cannot concur in defendants' view, either, that there was a forfeiture, or that if such was the case that Taliaferro by his payment to Johns succeeded to his rights or to Dye's. Clearly Taliaferro, when he made the payment, did so to protect the interest he acquired, if any, by the sale under the attachment,—indeed, such is the contention of counsel. (Supp. & Reply Brief, P. 2-3.) This being true Taliaferro was not attempting to create or buy an outstanding title, but to protect the title obtained through Dye. The alleged forfeiture was never completed because the money was paid to the co-owner before the ninety days after the conclusion of the advertisement, under Sec. 2324 R. S. U. S., and Taliaferro having acquired no rights under the void sale, was a mere volunteer and was not subrogated to the rights of anyone.

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But there is another, and it seems to us, a conclusive reason why there was no forfeiture. The record discloses that the title to the one-sixth interest was in the Apec Gold Mining Company, a corporation, while the notice was given by T. C. Johns. Johns was a stranger to the title and whole there is evidence that he was the manager of the Apex Gold Mining Company, yet he could not have given the notice in his own name. Statutes of forfeiture are strictly construed and must be strictly complied with. A notice to Dye that Johns had performed the labor as co-owner with him and that the title would be forfeited to him, was no notice that the Apex Gold

Mining Company, his real co-owner was attempting to advertise him out. Turner *vs.* Swayer, 150 U. S., 578.

The testimony of Walsh (P. 228 Record) shows that he did the work for the Apex Company. The Testimony of Taliaferro (P. 253 Record) shows that the one-sixth interest was not in Johns
431 but in the Apex Company. Just why we should assume that Johns was the owner of the one-sixth interest in his own right, in the face of this testimony of defendants' witnesses, does not appear.

"The burden of proof rests with the party asserting the forfeiture." 2 Lindley on Mines, Sec. 646.

The judgment of the Court Below was right, and is therefore affirmed.

EDWARD A. MANN,
Associate Justice.

We concur:
WM. H. POPE, *A. J.*,
IRA A. ABBOTT, *A. J.*

Mills C. J. and McFie, A. J. dissent from the conclusions of the majority of the Court.

Parker A. J., having heard the case below, did not sit.

And afterwards, on to wit, on the 28th day of August A. D., 1906, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a precipe for a transcript in the above entitled cause, which said precipe for a transcript was and is in words and figures following to wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 988.

BENJAMIN H. DYE ET AL., Appellants,
vs.
H. C. CRARY ET AL., Appellees.

Appeal from District Court, Socorro County.

432 No. 1113.

B. H. DYE ET AL., Appellees,
vs.
H. C. CRARY ET AL., Appellants.

Appeal from District Court, Socorro County.

The clerk of the Supreme Court of the Territory of New Mexico will please transmit to the Supreme Court of the United States, a transcript of record in the above cause twice before the Supreme

Court of the Territory of New Mexico, to-wit:—from said cause as numbered 988, the record entries; the opinion of the court together with the dissenting opinion therein; the motion for a rehearing; the motion to recall the mandate; order recalling the mandate; the writ recalling the mandate. From case No. 1113, the transcript of the record; assignment of errors, record entries, opinion of the court, stipulation as to testimony of witness H. C. Crary, assignment of errors on writ of error to U. S. Supreme Court, statement of facts and motion for statement of facts, affidavit of value.

(Signed) H. B FERGUSSON,
Attorney for Plaintiffs in Error.

433 TERRITORY OF NEW MEXICO, *Supreme Court, ss:*

I, the undersigned, clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the above and foregoing four hundred and thirty-two pages contain a true full and complete transcript of the record and proceedings, pleadings and opinions filed in two certain causes lately pending in the Supreme Court of the Territory of New Mexico, No. 988 B. H. Dye, *et al.*, appellants *vs.* H. C. Crary *et al.*, appellees, and No. 1113 B. H. Dye, *et al.* appellees and H. C. Crary *et al.*, appellants as called for in the *precipe* for a transcript herewith transcribed, and as the said papers appear on file in my office and remain of record in the records of proceedings of this court.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the 17th day of September, A. D., 1906.

[Seal of Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

Endorsed on cover: File No. 20,371. Territory of New Mexico supreme court. Term No. 406. H. C. Crary *et al.*, plaintiffs in error, *vs.* Benjamin H Dye and William B. Childers. Filed September 24, 1906. File No. 20,371.

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 406

H. C. CRARY, ET AL.,
Plaintiffs in Error.
vs.
BENJAMIN H. DYE AND
WILLIAM B. CHILDERS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

STATEMENT OF THE CASE.

This is an ejectment suit, instituted on the 28th day of December, 1900, in the court of the Fifth Judicial District for the County of Lincoln. Change of venue was taken by the plaintiffs to the County of Socorro, then in the Fifth Judicial District. The first trial took place in said County of Socorro, at the spring term of 1902, and resulted in a verdict by the jury, under instructions by the court, in favor of the defendants. On appeal duly taken by the plaintiffs the case on appeal was docketed and heard by the Supreme Court of the Territory of New Mexico at the January, 1903,

term, and reversed and remanded for a new trial. The second trial before a jury took place at the spring term of the District Court for Socorro County, 1905, and resulted in a verdict by the jury, under instructions of the court, in favor of the plaintiffs.

Thereupon the defendants, on their part, appealed to the Supreme Court of the Territory of New Mexico; but the judgment of the District was affirmed, and final judgment rendered in 1906 against the defendants. The defendants then sued out a writ of error to both of said opinions of the Territorial Supreme Court, and, as plaintiffs in error, now submit their case to this Honorable Court, with the following assignment of errors:

ASSIGNMENT OF ERRORS

Error to Supreme Court of the Territory of New Mexico.

Now comes the Plaintiffs in Error in the above entitled cause and assigns the following errors appearing in the record in this case in the action and in the opinions of the Supreme Court of the Territory of New Mexico, to-wit:

1. The court erred in overruling the motion for a rehearing in this cause made by the plaintiffs in error herein.

2. The court erred in its opinion in apparently holding that the use of the words "original attachment" in the New Mexico statute for attachment forbade the issuance of an alias writ of attachment.

3. The court erred in holding in its opinion that the New Mexico attachment statute in force at that

time did not authorize the issuance of an alias writ of attachment.

4. The court erred in its opinion in holding that the record in said attachment suit of Taliaferro vs. Dye shows that "no additional of other affidavit or band was filed" before the alias writ was filed, said record being wholly silent on that point.

5. The court erred in its opinion in applying the doctrine of the presumptions indulged in support of a judgment of a court of record under collateral attack, and in misconstruing and misapplying the decision of the court in Voorhees vs. The Bank, 10 Peters, 469.

6. The court erred in its opinion in failing to distinguish and apply the difference between a direct attack and a collateral attack upon the judgment of a court of record.

7. The court erred in its opinion in refusing to hold, the record being silent on the point, that the law conclusively presumes, under a collateral attack, that an alias affidavit and an alias bond were filed prior to the issuance of the alias writ of attachment.

8. The court erred in its opinion in ignoring and failing to decide the point raised in the trial court, and urged before the Supreme Court of the Territory of New Mexico, by the plaintiffs in error here, to-wit: that the court in said attachment suit, having held that said alias writ of attachment was its lawful writ, properly issued and served, and the property in question here lawfully attached thereunder, and having thereupon entered judgment for the plaintiff and sustained said attachment and ordered the sale of said property to satisfy said judgment, and said property having been duly sold and said judgment duly satisfied, and

the purchaser of said property having been put in possession thereof, and said attachment suit having been fully ended and become a matter of record; and no direct attack having been made on said attachment suit and judgment, and no offer to redeem said property from such sale having been made, and such judgment and sale having become final and not subject to direct attack, that the action of the court in said attachment suit in sustaining the sufficiency of its own process, and holding that it acquired jurisdiction of the *rem*,—even if erroneous on direct attack, is not such an error as can be corrected on collateral attack.

9. The Court in ignoring and failing to pass upon the point urged in both courts below by the plaintiffs in error here, to-wit: that, the court in said attachment suit having adjudged that the attaching of the *rem* in said suit was lawful and sufficient, and having entered final judgment, it will be presumed in support of said judgment, on collateral attack, that, the record in such attachment suit being silent on the subject, the court had evidence before it of all the facts necessary to justify its said action and judgment; and that to presume that an alias affidavit, and an alias bond had been filed, or that the court took evidence as to the then sufficiency of the bond filed, and as to the then existence of the grounds for attachment set forth in the attachment affidavit, and further publication of notice, would, either, have been a presumption consistent with and in no wise contradictory of, the record in said attachment suit, as it stands in said suit, and as it appears in the transcript in this case.

10. The court erred in admitting in evidence in this case on behalf of the plaintiffs (Defendants in error

here) plaintiff's Exhibit "O" being extracts from the cost book of the Clerk of the Court which tried said attachment suit, and not a part of the judgment roll; and in admitting the testimony of the witnesses for plaintiffs (Defendants in error here), W. B. Thompson, John E. Griffith, Ruby, Berry, J. E. Wharton, and W. M. Driscoll, the testimony of each of said witnesses being extrinsic evidence touching the judgment roll and record of the said attachment suit, admitted in this suit, which is a collateral attack on said attachment suit.

11. The court erred in its decision sustaining the collateral attack in this sentence: "The original writ of attachment should be returnable at the next term of court, while the alias writ of attachment might not be issued until long after such term."

12. The court erred in the following sentence in its opinion sustaining the collateral attack, to-wit:—"The position of appellees that section 2727, Comp. Laws, gives the court jurisdiction of the property of the defendant from and after the issuance of the writ is tenable only so far as it relates to the property levied upon," in this, that the true construction of said section 2727 of the Compiled Laws (1897) of the Territory of New Mexico, as held in the dissenting opinion in this case and as contended by appellees (Plaintiffs in error here) is that said section gave the court jurisdiction, after the first writ was found ineffective, to seize any other property of the defendant found in its Territorial jurisdiction, by an alias writ, if, in its discretion, such alias writ was deemed necessary, to enforce its jurisdiction of the subject matter, viz:—the collection of a debt by means of the attachment and sale

of the property of a non-resident debtor found in its Territorial Jurisdiction.

13. The court having found as a fact that plaintiff Dye, learned, upon his return to White Oaks, in April, 1899, of such attachment proceedings, and that the mine in question had been sold thereunder to the attachment plaintiff, Taliaferro, erred in failing to find also the admitted fact that Dye as a practicing lawyer and an enrolled member of the bar of the court which had approved said attachment proceedings and ordered said sale, as well as in his capacity of attachment defendant, had ready and complete means of actual knowledge of all that an inspection of such attachment proceedings would have disclosed.

14. The court erred in failing to find as a fact, admitted by Dye, that he learned soon after the entry of Heiniman & Crary into possession of said mine on June 5th, 1900 under their option to develop and purchase said mine from Taliaferro, of such entry into possession and beginning of development work; in failing to find as facts that said Dye was working on a mine of his own just across a gulch from the workings of Heiniman & Crary, and in plain view of the same; that he (Dye) from that time kept himself informed by frequent conversations with Heiniman & Crary, of the progress of such development work, the terms and conditions of said option and contract of Heiniman & Crary with Taliaferro, the time (six months) when said option would expire, and the amount ($1,500) of purchase money which Heiniman & Crary would have to pay to acquire said mine in addition to the expense of their development work: that he (Dye) learned of, and personally inspected, the

strike of rich ore made by Heiniman & Crary under such development work in the latter part of August, 1900, and thenceforth frequently visited such workings up to the service of process in this suit on Heiniman & Crary on January 17th, 1901, at which date Heiniman & Crary ceased said development work on said mine they had nearly three months previously paid for under said option; that during the whole of this time Dye frequently, in various conversations with Heiniman & Crary themselves, expressed his belief that their strike was a very valuable one, his hope that they would make a million out of it, and his belief that his (Dye's) adjoining property would be greatly beenfited thereby—even though the property they were developing had once been his, but he had lost it because of his poverty by means of Taliaferro's attachment suit.

15. The court erred in failing to find as a fact, which is admitted by Dye, that he (Dye) began to question in his own mind the validity of said attachment proceedings, and whether he migh avoid and evade them, as early as about the first of October, 1900; and failed and neglected, either himself, or by attorney, to at once investigate said attachment proceedings, and failed and neglected to communicate to Heiniman & Crary such question in his own mind, or to give them any warning of the loss that might befall them, in case he should attack said attachment suit and sale.

16. The court, having found in its opinion that Dye did submit to his attorney, on November 20th, 1900, the question whether said attachment proceedings were valid and binding on him or not, erred in failing to

find also as a fact that said Dye failed and neglected to communicate to Heiniman & Crary the fact that he had submitted to legal scrutiny the validity of the attachment suit on which their title to the mine in question was based, but knowingly stood by and permitted them to continue their development and expenditure for nearly two months thereafter.

17. The court erred in failing to find as a fact that on December 4th, 1900, said Dye learned from his attorney that in the opinion of his said attorney the said attachment suit and sale were null and void, and that he (Dye) could recover said mine notwithstanding said attachment suit and sale; and that said Dye thereupon immediately directed his said attorney to institute this suit in ejectment; and yet Dye failed and neglected to communicate to Heiniman & Crary the fact that this suit had, by letter, on December 4th, 1900, been ordered by him, and failed and neglected to warn Heiniman & Crary that their expenditures in further developing said mine after said December 4th, while valuable to the mine, might be wasted so far as they were concerned.

18. The court having found it to be a fact that Heiniman & Crary took advantage of a visit of said Dye to said mine and their development work thereon, on October 23rd, 1900, to state to him (Dye) that they were about to make payment of the purchase price named in their option on said mine, and to ask him (Dye), and did then and there ask him, if he knew of any reason why the title to the mine they were about to purchase was not all right, and that Dye replied that beyond an overlap on the surface on one said, that "there could be no other claimant, unless it was him,

and he had allowed his time to lapse, and made no further claims to the property." erred in not holding, as a matter of law, that said language of Dye, was tantamount to an assurance and promise on Dye's part, to Heiniman & Crary, that if they consummated their purchase he (Dye) would not in the future assert any possible claim of his against them, and therefore he is estopped to maintain this suit.

19. The court erred in failing to find as a fact that plaintiff Dye, from and after about October 1st, 1900, concealed from said Heiniman & Crary his doubts as to the validity of said attachment sale and that he might try to have the same annulled; and also concealed from and after said 4th day of December, 1900, the fact that he had on said last named date ordered the commencement of a suit to recover said property, though he well knew of the large expenditure said Heiniman & Crary were continuously making on said mine from said date in October and from said date in December.

20. The court erred in affirming the judgment of the court below.

Wherefore, and for divers other errors appearing in said record, the plaintiff in errors prays that the judgment below in this cause be in all things reversed, and set aside and that such further proceedings be had herein as may be agreeable to law.

(Signed) H. B. FERGUSSON,
Attorney for Plaintiffs in Error.

In order that the two defenses relied upon by defendants in the court below may be properly presented, a prior case, whose whole record is in evidence in this

case, should be described,—as follows: on the 8th day of March, 1898, Jones Taliaferro, a merchant, brought suit by attachment against Benjamin H. Dye, defendant in error here. The affidavit (R. p. 78) and bond (R. p. 68) for the attachment, as well as the writ issued thereon, were in due form and every way sufficient, as conceded by defendants in error. The writ (R. p. 79) was duly levied on certain land and lots of defendant, Dye, in White Oaks, N. M., and due return made by the sheriff. After such return, and prior to the expiration of the statutory sixty days within which the return should have been made, plaintiff Taliaferro discovered that a prior writ of attachment had been levied upon the same land and lots by another firm of merchants, Ziegler Bros., for a debt large enough to cover the entire value of said doubly attached property. Taliaferro also learned, at the same time that an undivided five-sixths interest in a mining claim, called the Compromise, in the same County, stood in the name of said defendant Dye. As his original writ of attachment had already been returned, executed, into Court, Taliaferro sued out an alias writ of attachment (R. p. 81) and had the same levied on said newly discovered mining interest, which said alias writ was returned, executed, on May 28, 1898. The record of said attachment suit is silent as to whether a new, or alias, affidavit and bond were given or not, before the alias writ issued; and silent as to whether or not the court took evidence as to the then truth of the attachment affidavit and the then sufficiency of the attachment bond.

Afterwards, on the 31st day of December, 1898, the court rendered judgment (R. p. 84) in favor of Talia-

ferro against Dye for the amount claimed; and also rendered judgment (R. p. 84) in said attachment proceedings, sustaining the same, and also ordering the sale of said mining interest, attached under said alias writ, and constructively held, by the court since May 24, 1898, to satisfy said judgment debt. Said mining interest was on the 18th day of February, 1899, duly sold by the sheriff to plaintiff Taliaferro (R. p. 86), and said debt satisfied (R. p. 89). Thus ended said attachment suit. No appeal was taken by defendant Dye; no direct attack upon said attachment suit or sale was made; and no offer made to redeem said mining interest, within one year. Said judgment and attachment proceeding still stand unreversed, unmodified and unassailed on the records of said District Court.

Subsequently said Taliaferro disposed of the whole of said mining interest to H. C. Crary and Eugene Heiniman (R. p. 91), who held the same when this ejectment suit, now before the court, was commenced. After such institution of this suit, Taliaferro, with Chas. Spencer, bought a small interest in said mining from said Crary and Heiniman (R. p. 93), and was afterwards, on motion with other purchasers, joined as defendants.

On the 28th day of December, 1900, said Dye and his privy, William B. Childers, instituted this suit in ejectment against said H. C. Crary and Eugene Heiniman (R. p. 29), to recover possession of said five-sixths interest in said Compromise mining claim, so sold under said attachment proceedings. The defendants, under the general issue, relied upon two defenses, as follows:

1. That the suit was a collateral attack upon a judgment of record in a District Court of this Territory; and that any defects in said attachment, judgment and sale were such as could be availed of only on a direct attack.

2. That, however defective such attachment proceedings might have been, yet Dye had, before the institution of this suit, by his representations, acts, conduct and culpable silence when he should have spoken, estopped himself to recover said mining interest from said Crary and Heiniman and their privies in estate.

Upon the first trial, while evidence as to both defenses was introduced, yet as the trial court instructed the jury to find for defendants generally, only the first defense, or the question of collateral attack, was considered in the Supreme Court of the Territory. Said opinion, holding that the collateral attack could be made, is found in R. p. 21. But the opinion was by a divided court; and the dissenting opinion of the Chief Justice and one Associate Justice is found in R. p. 25. Of the assignments of error, those numbered 1 to 12 inclusive relate to the first opinion and the question of collateral attack.

Upon the second trial, the District Court held that it was bound by the unreversed decision of the Territorial Supreme Court, and considered only the second defense which set up estoppel. The court held that such alleged estoppel was not made out, and peremptorily instructed the jury to find for plaintiffs. On appeal, the Supreme Court of the Territory affirmed this action of the trial court, in the second opinion, found

in R. p. 269; and the assignment of error after the 12th relate to this second opinion.

I.

THE COLLATERAL ATTACK

A motion for a re-hearing on this point in our Supreme Court was filed, and is found in R. p. 4.

Plaintiffs in error contend:

1. *That New Mexico attachment laws authorize alias writs of attachment.* The section of such laws in force at the commencement of said attachment suit (March 8, 1898), are in Compiled Laws 1897, as follows:

"Section 2697. Original writs of attachment shall be issued and returned in like manner as ordinary writs of citation."

"Section 2871. In all the courts of this Territory the common law as recognized in the United States of America shall be the rule of practice and decision."

Sec. 54, Chapter 4, of the Session Laws of 1878 of the New Mexico legislature is as follows:

"54. All suits at law in the District Courts shall be commenced by filing a declaration in the office of the Clerk of th eCourt, and the pleadings and practice shall be according to the forms and rules of the common law."

The rule of the common law, and the practice of the District Court of New Mexico is for the court to issue, in its discretion, alias and pluries writs of citation.

24 Am. & Eng. Enc. of Law (1st Ed.) 524, Note 2.

Section 2685, sub-sec. 28 (Compiled Laws 1897):

"When any process has not been returned,

> or has been returned without service, or has been improperly served, it shall be the duty of the clerk, upon the application of any party to the suit, to issue other process to the same or any other county, as the party applying may direct." Said sub-section 28 is from the code of practice and procedure enacted in 1897, and may be taken as a re-enactment (to make the code complete in itself) of sections 2871 and 2697 above quoted.

But as if to remove all questions of the right of District Courts to issue, in their discretion, alias writs of attachment, it is provided in said Compiled Laws at Section 2727:

> "From the time of the issuing of the order of attachment, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings in relation thereto."

"Whether the writ should have been issued simultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction."

Cooper vs. Reynolds, 10 *Wall.* 308.

And this language was used in construing an attachment statute which does not contain such a provision as said section 2727 above quoted, defining exactly the point where the jurisdiction of our District Courts begin in attachment suits; and we respectfully submit that the word "jurisdiction" in said section must mean the discretionary power to take thereafter whatever steps may be necessary to subject the property of the absent debtor, within the territorial jurisdiction of the court, to the payment of his debt.

2. Alias writs of attachment not being prohibited

by statute, and our District Courts (courts of record) having been given jurisdiction of attachment suits by our statute, we submit that

Our Districts Courts have inherent power to issue alias writs of attachment.

4 *Cyc. of Law and Proc.*, 553, *note* 27.
Hamill vs. Phenecie, 9 *Iowa*, 525.
Elliot vs. Stevens, 10 *Iowa* 418.

3. *Distinction between irregular, or erroneous acquiring of jurisdiction, and not acquiring jurisdiction at all.*

1 *Freeman on Judgments, Secs.* 126, 130.
1 *Black on Judgments, Secs.* 170, 272.
17 *Am. & Eng. Enc. of Law*, 1068, *Note* 1.
Idem, 1069, *Note* 2.

In said attachment proceedings, collaterally attacked here, the *res* was actually seized by the sheriff under a writ issued by the proper officer, under the seal of the court, and duly returned, according to statute, into court, and by the court, after judgment in the main case, and after judgment sustaining all prior steps in the attachment proceeding, was, after the due compliance with the statutory requirements as to advertisement, etc., sold as the statute requires. The only ground upon which this collateral attack is made is that the issuance of the alias writ was not authorized by statute. We submit that after such seizure and sale of the *rem*, it is too late, after allowing the time for direct attack and for redemption, to expire, by collateral attack to reach what was at most but an irregular or erroneous acquiring of jurisdiction of the *rem*.

The court trying said attachment suit had before it the whole record,—both the original and the alias

writ of attachment—up to the making the order of sale, and adjudged it all, including the said alias writ, as lawful. We submit that even if the court was in error in thus approving said alias writ, such error cannot be corrected in a collateral proceeding.

4. *Authorities controlling in direct attack, are not in point a collateral attack.*

"In the case of Voorhees, et al., vs. The Bank of the United States, 10 Peters, 499, this court says:

> 'So long as this judgment remains in force it is evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment. The errors of the court, however apparent, can be examined only by an appellate power. That was a procedure by attachment, and there were many errors on the face of the record, which would have required an appellate court to reverse the judgment; but they could not be considered when the record of the judgment was introduced collaterally."

Huff vs. Hutchinson, 14 *How.* 356.

See also:

Keybers vs. Macomber, (Cal.) 7 *Pac.* 838.

> "But jurisdiction irregularly obtained is nevertheless jurisdiction—the power to hear, decide and adjudge—and when this exists the judgment cannot be void."

Burk vs. Interstate, etc., Ass'n, 64 *Pac.* 879.

> "A distinction is to be made between a case where there is no service whatever and one which is simply defective or irregular. In the first case the court acquires no jurisdiction, and its judgment is void. In the other case, if the court to which process is returnable adjudges the service to be sufficient, and renders judgment therein, such

judgment is not void, but only subject to be set aside by the court which gave it, upon reasonable and proper application, or reversed on appeal."

Isaac vs. Prier, Fed. Cas. No. 7097. (Opinion by Judge Dillion.)

V.

In the attachment case of Taliaferro vs. Dye (in question here) the court decided that the property in controversy had been duly attached by the levy of the alias writ. Such decision of that jurisdictional question is conclusive in this collateral attack, and if erroneous, could only have been corrected on direct motion in that court, or by appeal from such decision.

It is not denied by defendants in error in this case that the court had jurisdiction of the person (constructive), nor of the subject matter (the collection of a debt from a non-resident defendant by attachment of property); but it is claimed by them that the court did not also acquire jurisdiction of the *rem*.

We have cited authorities to show that our statutes authorize the issuance of alias writs of attachment and the inherent power of our courts, as constituted, gives them such right.

Having thus jurisdiction of the person (by publication), and of the subject matter (the collection of a debt from a non-resident) the court in Taliaferro vs. Dye, when it was asked to give final judgment, was confronted with the question whether it had acquired jurisdiction of the *rem*. After due consideration, with its record in the case all before it, including the alias writ of attachment, duly issued under the seal of the court, levied and returned by the proper officer, the

court decided that it had properly acquired jurisdiction of the *rem*, gave judgment for the debt and ordered the sale of the property (R. p. 85). Even if the court erred in thus deciding in favor of its own jurisdiction, such error could be corrected only by direct attack on it by appeal or otherwise, and cannot be corrected on a collateral attack; it is at most voidable and is not void. The court there only decided a question it was vested with power to hear and determine, viz: whether the *res* had been properly attached, it having already acquired jurisdiction of the person and of the subject matter.

> "Wherever the right and the duty of the court to exercise its jurisdiction depend upon the decision of the question it is invested with power to hear and determine, there its judgment, right or wrong, is impregnable to collateral attack, unless impeached for fraud."
>
> *Foltz vs. St. Louis, etc., Ry. Co.*, 60 *Fed.* 316.

> "Judgments of courts within the scope of their power to hear and determine are not void, whether right or wrong, and they are impregnable to collateral attack; but judgments of courts, in cases beyond the scope of their power to hear and determine are nullities."
>
> *Board of Com'rs vs. Platt*, 79 *Fed.* 467.

> "Jurisdiction is the power to hear and determine. To make the order of sale required the exercise of this power. It was the business and duty of the court to ascertain and decide whether the facts were such as called for that action. * * * The settled rule of that law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when

collaterally questioned, is held to be conclusive of the rights of the parties."

Cornett vs. Williams, 20 *Wall.*, 249.

"The court having general jurisdiction over the subject matter of decreeing the sale of real estate of deceased debtor for the payment of debts, it had the right and was required to determine the question as to the liability of the property for the debts, and whether the case was within its jurisdiction and though its decision may have been erroneous, it could only be reversed upon direct appeal."

Manson vs. Duncanson, 166 *U. S.* 533, also reported in 17 *Sup. Ct. Rep.* 1101.

"While there are cases to be found to the contrary, yet the decided weight of authority sustains the following propositions, to-wit: That when a collateral attack is made on the validity of judicial proceedings, the question whether the court whose order or judgment is attacked could, under any state of facts, have had jurisdiction, is always open to examination; but if it appears that the court had jurisdiction over the general subject matter, and the question is, whether the court had the right to proceed i nthe particular case before it, the right to proceed being dependend upon the existence of certain facts, and the court by proceeding adjudges that it has jurisdiction in this particular case, the court thereby adjudges the existence of all the facts necessary to sustain the jurisdiction. And as this adjudication is within the power to make, it is, when made, binding upon all parties, unless reversed by a proper and direct proceeding to that end, and until thus reversed it is conclusive, and cannot be attacked in a collateral proceeding."

Graff vs. Louis, 71 *Fed.* 591.

See also:

Hatcher vs. Hendrie, 133 *Fed.* 267.

Melin vs. Moline Iron Co., etc., 131 *U. S.* 352.

Skinner vs. Moore, 30 *Am. Dec.* 155-164.

"The judgment must nevertheless stand when collaterally questioned, because the law presumes that a proper affidavit was made, and such presumption will exist until the contrary is affirmatively shown *by something contained in the record.*"

Hardy vs. Beaty, 19 *S. W.* 778.

"The rule is this: Where the subject matter of the suit is one which falls within the cognizance of a court of general jurisdiction, and a petition or bill calling for the exercise of the power of the court is filed, and service of process made, which the courts finds or holds to be sufficient, and renders judgment, though it may be reversed on error or appeal, is not void for reason of defects in the petition or in the mode of service or return of the officer. Miller vs. U. S., 11 Wall. (78 U. S.) 268-299, per Strong, J.; Grignon's Leassee vs. Astor, 2 How. (43 U. S.) 339; Cooper vs. Reynolds, 10 Wall. (77 U. S.) 308; Voorhees vs. Bank, 10 Peters (35 U. S.) 449-474; Morrow vs. Weed, 4 Iowa, 77 and authorities there cited; Hart vs. Seixas, 21 Wend., 40; 1 Smith's Leading Cases, 378, and American Notes to Creppe vs. Durden (Cowp. 640). Any other rule would unsettle titles, and has nothing to recommend it in new state, where property is so rapidly increasing in value."

21 *Fed. Cas. No.* 12251.

See also:

1 *Freeman on Judgments, Sec.* 130.

1 *Black on Judgment, Sec.* 274.

Drake on Attachment, Secs. 447-8;
Tillon vs. Cofield, 93 *U. S.* 163;
Colfax vs. Richardson, 54 *Pac.* 359;
McNitt vs. Turner, 16 *Wall.,* 366;
Paine vs. Moreland, 15 *Ohio,* 445;
Cochran vs. Loring, 17 *Ohio,* 432;
Mathews vs. Densmore, 109 *U. S.,* 216;
Simmons vs. Saul, 138 *U. S.,* 439;
Mohr vs. Maniere, 101 *U. S.,* 417.

VI.

PRESUMPTIONS.

The presumptions indulged in support of the jurisdiction of a court of record whose judgment is collaterally attacked, if, as in the case now before this court, such judgment has been followed by a sale to an innocent purchaser, are conclusive of this case. Sections 2721 and 2722 Compiled Laws 1897, authorize ancilary attachments.

If the original writ of attachment is for any reason unavailing, the main suit does not abate, but remains as if originally brought without attachment.

Staab vs. Hersch, 3 *New Mex.,* 209.

Why may not an ancillary attachment be subsequently filed in the same action? That it may be is expressly held in Brown vs. Isbell, 11 Ala. 1009.

The record in this case shows that two writs of attachment were issued in the attachment proceedings collaterally questioned here. The first writ was returned within sixty days as levied upon certain property of defendant Dye. The plaintiff in such attachment suit, Taliaferro, offered to prove that the property seized under the first writ had been previously at-

tached in another suit (Zeigler vs. Dye, R. pages 119-125). Thereupon the alias (or Ancillary?) writ was issued and levied upon the property sued for in this case. The record in said attachment proceedings is wholly silent as to whether an alias (or Ancillary?) affidavit and an alias (or Ancillary?) bond were filed prior to the issuance of such alias writ.? It could lawfully have been done, as the main suit was still pending. That such alias affidavit and bond were filed, or that the court had before it other facts to justify its holding that the property in controversy here had been duly attached, is conclusively presumed when such proceedings are collaterally attacked.

> "Their order for sale was evidence of that or any other fact which was necessary to give them the power to make it; and the same remark applies to the order to give notice to the parties. This is a familiar principle in ordinary adversary actions, in which it is presumed after verdict, that the plaintiff has proved every fact which is indispensable to his recovery, though no evidence appears on the record to show it, and the principle is of more universal application in proceedings in *rem* after a final decree by a court of competent jurisdiction over the subject matter."
>
> *Sargeant vs. State Bank of Indiana*, 12 *Howard*, 385-6.

This case also quotes with approval—

> *Voorhees vs. Bank*, 10 *Peters*, 473. and
> *Grignon's Lessee vs. Astor*, 2 *How.*, 319.

> "Therefore, every presumption, not inconsistent with the record, is to be indulged in, in favor of its jurisdiction. Kempe's Lessee vs. Kennedy, 5 Cranch, 173; see also: Voorhees vs. Bank of the U. S., 10 Pet. 449;

Grignon vs. Astor, 2 How., 319; Harvey vs. Tyler, 2 Wall., 328."

Applegate vs. Lexington, etc., Mining Co., 117 *U. S.*, 255.

Also—

White vs. Crow, 110 *U. S.*, 183.

"Acts done which presupposes the existence of other acts to make them legally operative are presumptive proofs of the latter."

Cornett vs. Williams, 20 *Wall.*, 249.

"The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive an all whom it concerns. The record is absolute verity, to contradict which there can be no argument or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet. 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind; if the court, which rendered it, have, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the right to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction, they are not inferior courts, in the technical sense of the

term, because an appeal lies from their decisions. * * * They have power to render final judgments and decrees, which bind the persons and things before them conclusively, in criminal as well as civil cases, unless reversed on error or by an appeal. The true line of distinction between courts whose decisions are conclusive, if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent, by its constitution, to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. * * *

These principles have been applied by this court to sales made under the decree of orphan's courts; where they have power to judge of a matter of fact, they are not required to enter on record the evidence on which they decided that fact. And how can we now say but that court had satisfactory evidence before it, that one of the heirs was of age? If it was so stated on the face of the proceedings, and even if the jurisdiction of the court depended on that fact, it is by no means clear that it would be permitted to contradict it, on a direct proceeding to reverse any order or decree made by the court. But to permit that fact to be drawn in question in this collateral way, is certainly not warranted by any principle of law."

Thompson vs. Tolmie, 2 Pet. 165.

"If the purchaser (under a decree of the orphan's court) was responsible for their mistakes in point of fact, after they had adjudicated upon the facts, and acted upon

them, those sales would be snares for honest men."

"In Vorhees Vs. The Bank of the United States, the same principle is applied to sales or executions under judgments on adversary powers, and such hereafter must be taken to be the established law of judicial sales, as well relating to those made in proceedings *in rem* as *in personam*, 10 Pet. 473.

"We will not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that case, or the cases which proceeded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the states have followed, and this court has never departed from them. They are rules of property, on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed invoilable in collateral action, or none can know what is his own."

Grignon's Lessee vs. Astor, 2 How. 319.

We have quoted at length from this case, because it is in point, and because it is referred to and followed by all federal courts down to date, and by a vast majority of state courts.

The appellants ask leave to insert here an extract from their motion for a rehearing, filed in this court on the former hearings, as follows, to-wit:

"The court (R. 13), inadvertently errs in stating what the record in the attachment suit, collaterally attacked here, shows, using these words: 'The record also shows that on the 11th day of May, 1898, an alias writ of attachment was issued, and that no additional or other affidavit or bond was filed.'

"This is erroneous, and is most prejudicial to the

rights of the appellees. That statement by the court is tantamount to saying that the record affirmatively shows that no new or additional affidavit and bond were filed preliminary to the issuance of the alias writ. The record is wholly silent on this point, and I earnestly request the court to inspect the record again. If the court is right, that the record affirmatively shows no new or additional affidavit and bond were filed, then the case of Voorhees vs. Bank in 10 Peters is not in point in favor of appellees; but if the record is silent on that point, then said case is certainly conclusive in favor of appellees; because the case holds, the records being silent as to the existence of necessary jurisdictional steps prior to the issuance of the writ, that it will be conclusively presumed that such steps were lawfully taken."

Voorhees vs. Bank of the United States, 10 *Peters,* 469.

"It has been repeatedly held by this court that when the validity of a domestic judgment is sought to be attacked collaterally on the ground of want of jurisdiction, the jurisdiction is to be conclusively presumed, unless the contrary affirmatively appears on the face of the record itself; that this presumption obtains when the record is silent upon the jurisdictional fact, as well as when it affirmatively states or recites it. The want of jurisdiction does not affirmatively appear on the face of the record in this case. The mere absence from the judgment roll of certain papers which ought to have been made a part of it, and which, if included, would affirmatively show that jurisdiction would have been acquired, is not enough to make it

"affirmatively appear from the face of the record that the court had no jurisdiction."

Gulickson vs. Bodkin, 80 *N. W.* (*Minn.*) 783.

III.

The court erred in its statement of the points considered by the Supreme Court of the United States in its decision of said case in 10 Peters and in its application of said case in this case. The Supreme Court of New Mexico in its opinion, (R. 13) states those five points as follows:

> "The five objection, in short, were: 1, That the affidavit was not in proper form. 2, That there was not sufficient notice given for sale. 3, That the defendants were not three times called as provided by law. 4, That the sale was made before the expiration of the time of notice, and 5, That the return of the auditor showed the deed executed to a person other than the purchaser."
>
> "Such is the statement by this court. The statement the five points made by the Supreme Court of the United States, is found in its opinion in said case at page 470, 10 Peters, and is as follows:
>
> "'1. By the first section is provides that an affidavit shall be made and filed with the clerk before the writ issues, and, if this is not done, the writ shall be quashed, on motion; no such affidavit is found in the record.
>
> "'2. The 15th section directs three months' notice to be given by publication in a newspaper, of the issuing of the attachment, before the judgment shall be entered; the 11th section also prescribes that fifteen days' notice of sale shall be given by the Auditors, neither of which appears by the record to have been done.
>
> "'3. By the proviso to the 8th section,

the defendant must be three times called, at each of the three terms preceding judgment, and make default, which defaults shall be recorded by the clerk; no entry is made of such defaults at the December term, 1807.

"'4. By the 11th section, the auditors are prohibited from selling till the expiration of twelve months from the return of the writ; whereas the order issued before; and it does not appear when the sale was made.

"'5. The return of the sale by the auditors shows a sale to one person, and a deed to others; not in any mode connected with the record.'

"The highly injurious error of our Supreme Court is in its statement of the first point, that the United States Supreme Court stated in its opinion in the 10 Peters case that the affidavit was not in proper form—and thus evades the force of that decision, which is that, as the record in the case attacked contained no such attachment affidavit as the Ohio statute prescribed, yet the law, on collateral attack, conclusively presumed, in favor of the judgment attacked, that such affidavit had been duly made.

"So the record in the attachment suit, collaterally attacked here, is silent as to the filing of a new, or additional, or alias bond and affidavit for attachment before the alias writ was issued, and therefore this court must, under the authority of the 10 Peters case, hold that, as the court in the attachment case of Taliaferro vs. Dye, collaterally attacked here, recognized the validity of the alias writ and ordered the property seized thereunder sold, said court must hold in the utter silence of the record on the subject, that the existence of such new or additional or alias bond and

affidavit is conclusively presumed. Such is the exact decision in Voorhees vs. The Bank, 10 Peters, 469, and it cannot be denied—in fact, this (Territorial Sup. Ct.) court impliedly admits that had such alias affidavit and bond been filed, and been found in the record, the attachment sale of the property in dispute here would have been valid. In Cooper vs. Reynolds, 10 Wall., 308, near the top of page 320, it is said: 'Whether the writ should have been issue dsimultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction.' This (Territorial Sup. Ct.) court decides that no jurisdiction of the *rem* is acquired by the court under our statute, until the *res* is actually seized under the process of the court; and quotes Cooper vs. Reynolds as so holding under similar statute. We do not controvert that position; and it is beside the point at issue in our case. The case of Cooper vs. Reynolds was relied upon by appellees as holding that a defective publication notice was not a jurisdictional defect and could not be reached in a collateral attack. It touches no other question in our case, save that, at said page, it quotes approvingly Voorhees vs. The Bank in referring to the presumptions indulged in favor of judgments collaterally attacked. Besides, in our case, the property sold was seized and subjected to the dominion of the court, under a writ duly issued, under the seal of the court, delivered to the proper officer, and by him executed and returned into court;—the only questions as to such writ being whether not having 'been issued simultaneously with the institution of the suit', and having been denominated as 'alias writ':

"1. Was it authorized by our attachment statute?

"2. Was it within the inherent power of the court to issue it, without special statutory authorization?

"3. Was the lower court's decision that the seizure of the Compromise mine under such alias writ was a valid levy, such an error, if error, as can only be corrected by a direct attack and was such an error, if error, as cannot be reached in a collateral attack?

IV.

"The court, (Sup. Ct. of New Mexico) failed to decide the point relied upon by appellees, that even if our statute does not authorize an alias writ, and even if it is not within the inherent power of the court to issue an alias writ, yet still as the court had jurisdiction of the defendant, under service by publication, and had jurisdiction of the subject matter (the collection of a debt of a non-resident from his property in the court's territorial jurisdiction), and had jurisdiction of the whole case under Section 2727 of our attachment statute, its decision that the levy of such alias writ was a valid seizure of defendant's property, that such an error, if error, is not such as can be availed of by a collateral attack. We confidently reply upon the following authorities in support of the proposition, that, the court, in the case of Taliaferro vs. Dye, having decided that the levy of the alias writ of attachment upon the property of the defendant was a valid seizure of the *rem*, and such property having been sold to satisfy the judgment debt, such decision of the court can be corrected, if erroneous, only by direct attack, and cannot be reversed in any collateral attack.

Graff vs. Louis, 71 *Fed.* 591.

Manson vs. Duncanson, 166 *U. S.*, 533.

Also

Supreme Court Rep., Vol. 17, *p.* 647.

V.

"The doctrine of presumptions indulged in to uphold judicial sales, which doctrine this, (Sup. Ct. of New Mexico) court, in its opinion, wholly ignores, under the Voorhees vs. The Bank case in 10 Peters, also elaborated in Black on Judgments, Section 270, makes the alias writ in this case a valid writ, by conclusively presuming that a proper alias affidavit and alias bond were filed before the alias writ was issued, the record being silent on that subject.

"1. In the attachment suit in Taliaferro vs. Dye, collaterally attacked here, the court had jurisdiction of the particular case, by positive statutory enactment. Compiled Laws, Section 2727. The court in Taliaferro vs. Dye expressly found in its judgment that the alias writ was a valid writ. Whether he did so on the ground that our statute authorized the alias writ, or on the ground that it was within the inherent power of the court, or that an alias bond and affidavit had been filed, is immaterial. The Supreme Court of the United States in a case of collateral attack uses this language:

> " 'The record does not inform us upon what view of the legal import of these provisions the District Court proceeded in awarding the decree of sale. It may have been thought * * *. We do not wish to be understood as intimating that either of such views would have been a sound construction of the trust deed; but we do say that these were questions before the District Court for decision, and if any error was

committed by that court, the remedy was by appeal, or by a bill of review, if duly filed.'

Manson vs. Duncanson, 166 *U. S.* 533.

" 'When the jurisdiction of a court depends upon a fact which it is required to ascertain in its decision, such decision is binding, until reversal in a direct proceeding.' 1 Black on Judgments, Section 274. The court was required to decide whether the property had been seized under its process. See also Graff vs. Louis, 71 Fed. Rep. 591.

"2. Presumptions in favor of judgments collaterally attacked, especially after judicial sale.

1 *Black on Judgments, Section* 271.

"In the case of Taliaferro vs. Dye, now under review, the trial court held that by due process of itself the property had been duly attached. It was forced to decide that question in order to proceed to sale. 'At all events, the decree of the court expressly finds that due service had been made upon the defendants, and in this proceeding, which is not an appeal from, but a collateral attack on, the decree, every presumption is in favor of the regularity of the proceedings and the jurisdiction of the court. The rule is this: When the subject matter of the suit is one which falls within the cognizance of a court of general jurisdiction, and a petition or bill calling for the exercise of the power of the court is filed, and service of process is made, which the court finds or holds to be sufficient, and renders judgment, though it may be reversed on error or appeal, it is not void for reason of defects in the petition, or in the mode of service, or return of the officer.' Salisbury vs. Sands, Fed. Cas. No. 12251; decision by Judge Dillon; citing Miller vs.

U. S., 268, 299. Grignon's Lessee vs. Astor, 2 How., 339. Railroad Co. vs. Stimpson, 14 Pet., 458. Cooper vse. Reynolds, 10 Wall., 308. Voorhees vs. Bank, 449, 474, and certain State cases. Even if the seizure of the property in Taliaferro vs. Dye was under a process irregular or defective, yet if the court held it sufficient, even though erroneously, yet the error cannot be corrected in a collateral proceeding.

"The court, or under this statute, the judge was authorized to determine whether the service of publication had been made, and its sufficiency, and such determination, though erroneous, cannot be revised in a collateral proceeding by another court, but such determination must stand and be respected until it is reversed by or set aside in some direct proceeding."

Fed. Cas. No. 13093 (*Smith vs. Pomeroy*).

"In Voorhees vs. Bank, 10 Peters, the court, referring to the order of sale of the attached property, says: 'They ordered a sale, which was executed, and on the return thereof gave it their confirmation. This was the judgment of a court of competent jurisdiction on all the acts preceding the sale, affirming their validity in the same manner as their judgment had affirmed the existence of a debt. There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears.' So in that case the court held that the absent affidavit, a condition precedent to the sale, the record containing nothing to the contrary, was conclusively presumed to have been duly filed. Why in our case shall it not be conclusively presumed that an alias bond and affidavit were duly filed before the alias writ issued?"

" 'So where by reason of the loss of the record, or any part of it, there is difficulty in discovering the ground upon which jurisdiction was taken in the particular case, if there be any ground upon which the court could have rightfully taken cognizance of the case, it will be presumed that it assumed jurisdiction on that ground, unless it be made to appear affirmatively by the record that it was taken upon some other ground.'

1 *Black on Judgment, Section* 271, *quoting Woodhouse vs. Filbates, 77 Va.* 317."

(End of quotation from motion for a re-hearing)

The presumption in favor of jurisdiction where judgment is collaterally called in question is conclusive—the question is to be decided only by inspection of the judgment roll, and no extrinsic evidence is admissible.

See authorities above cited as to the presumption generally.

See also the following:

Sacramento Bank vs. Montgomery, 81 *Pac.* 138.

1 *Black on Judgments, Secs.* 271-7.

1 *Freeman on Judgments, Secs.* 1311-2-3-4.

Treat vs. Maxwell, (Me.) 19 *Atl.* 98.

Robinson vs. Fair, 128 *U. S.* 53.

17 *Am. & Eng. Enc. of Law (New), p.* 1080, *head of "Conclusiveness of Presumption," and note* 5 *Idem. P.* 1081, *note* 2.

12 *Enc. of Pl. and Pr., p.* 205, *note* 2, *p.* 207, *note* 1, *and p.* 208, *note* 1.

Therefore the court below, on the trial of this case,

erred (assignment of errors, 10) in admitting the depositions of W. M. Driscoll (R. 103), and J. E. Wharton (R. 110), and the verbal testimony of W. B. Thompson (R. 98), John E. Griffith (R. 99), and Ruby Berry (R. 117), and plaintiff Exhibit "O" (R. 96), all being extrinsic evidence intended to overthrow or impeach the record of said attachment suit of Taliaferro vs. Dye.

VI.

This court (the Territorial Sup. Ct.), in its opinion reversing this case, uses this language:

"The original writ of attachment would be returnable at the next term of the court, while the alias writ of attachment might not be issued until long after such term."

This was an inadvertence. Our statutein force when said writs were issued (C. L. 1897, Sec. 2685, Sub. Sec. 176) provided that writs of attachment should be returned within sixty days.

VII.

This (Ter. Sup. Ct.) court also uses these words in that opinion:

"The position of the appellees that Section 2727, Compiled Laws, gives the court jurisdiction of the property of the defendant from and after the issuance of the writ is tenable only so far as it relates to the property actually levied upon. The court acquires its jurisdiction from a legal writ, a levy thereof and a return thereon by the proper officer. In Cooper vs. Reynolds *supra* at page 319, the court says: 'Now in this class of cases on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which in this case is the same effect,

the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely in *rem*. Without this the court can proceed no further; with it, the court can proceed to subject that property to the demand of the plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court, the power of the court over the rest is established.'

"This case is much relied upon by appellees."

This discussion by the court of the case of Cooper vs. Reynolds seems to assume that the character of the writ of attachment was the point at issue, which the United States Supreme Court was deciding. An inspection of the facts of that case reveals that the affidavit of attachment, which did not follow the statute, and the publication notice, which would have been held insufficient on direct attack, were the points which the Supreme Court decided in that case. It is fully settled that remarks by the court upon a question not raised in the case before it cannot be taken as authority in subsequent decisions on a point not before it for decision.

"This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits."

Harriman vs. Northern Securities Co., 197 *U. S.* 244.

See also—

Cohens vs. Virginia, 6 *Wheat.* 399.

Carroll vs. Carroll, 16 *How.* 275.

Appellants' reply on the case of Cooper vs. Reynolds in legitimate support of points made by them in this case now on hearing.

Said case of Cooper vs. Reynolds defines the subject matter thus: "By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred."

It says also: "Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such orders as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject matter of the cause."

In the Taliaferro vs. Dye attachment, jurisdiction of the *rem* is (was) obtained by a seizure (of the Compromise mine) under process of the court and was held till judgment sale. What was this (at most), but the irregular or erroneous exercise of jurisdiction? What power the court has over property thus seized "under its process" depends on the extent of its authority conferred in regard to the subject matter, and the subject matter is the subjection of property within the territorial jurisdiction of the court, to the payment of the debts of non-resident owners of such property. Such irregular or erroneous exercise of jurisdiction, if irregular or erroneous, cannot be corrected on collateral attack.

> "But we do not finde it necessary to determine whether a *scire facias* was a proper

remedy or not. It is a sufficient answer to appellant's contention that the court had jurisdiction of the subject matter. Under Rev. St. Sec. 563 * * * The error, if any were committed, did not go to the jurisdiction of the court, but only to the particular remedy pursued, and the action of that court in respect thereto was binding in a collateral proceeding."

Insley et al vs. United States, 150 *U. S.* 512.
Hendrick vs. Whittemore, 105 *Mass.,* 23.

A court has the right to decide as to its own process, whether void or not, if it has jurisdiction of the subject matter. "It is perfectly immaterial whether the ruling made was right or wrong."

Rose vs. D. V., etc., R. Co., 47 *Iowa,* 420.

In Hendrick vs. Whittemore, 150 Mass., 23, cited with approval by the Supreme Court of the United States in Insley vs. U. S., above cited, we find this language:

"Many considerations favor the rule that judgments of a court of competent jurisdiction which are erroneous by reason of defective process, can be impeached by parties thereto only by proceedings instituted directly for that purpose. The plaintiff is concluded by such judgment. His demand is merged in it. He cannot treat it as a nullity, and proceed again upon his original demand as if no such judgment had been rendered. He can only proceed by levy of execution or by suit upon his judgment. * * * The writ is merely the process by which the court gains jurisdiction of the person of the defendant. The effect of an insufficient writ, upon the subsequent proceedings, cannot be essentially different from the effect of an improper service, or a failure of service upon

the defendant. Defects of that character often furnish the cause for reversal, by writ of error, of judgments rendered by justices of the peace, as well as in inferior courts. And we are satisfied that for errors in the mode of exercising a judicial authority vested in a justice of the peace, the writ of error is the appropriate remedy by which to set aside the judgment; and that until so set aside the parties are concluded by it."

Hendricks vs. Whittenmore, 105 Mass., 23, and Cooper vs. Reynolds is authority for these propositions, on which appellants rely; that such jurisdictional defects as insufficient affidavit and inadequate service by publication, if the court passed on them as sufficient, cannot be corrected on collateral attack, even if they would be fatal on direct attack; and that it will be presumed, in support of a judgment and judicial sale under it, on collateral attack, that everything was done that was necessary to be done to make the sale legal, unless such presumption is overthrown by the judgment roll itself.

VII.

Attachment proceedings conducted by a court of general original jurisdiction are entitled to the same presumptions as other judgments of such courts.

Van Waggeman vs. Carpenter, 61 *Pac.* 698.

VIII.

The legislature has plenary power in enacting attachment laws.

Robinson vs. Hesser, 4 *N. M.*, 282, 288

Cleland vs. Tavermir, 11 *Minn.*, 126.

"The manner in which such jurisdiction (in attach-

ment) should appear is regulated by statute."

1 *Wade on Attachment, Sec.* 38 (*N.*) 6.

Sec. 2727 of our attachment law fixes the exact point where jurisdiction arises, or begins in each attachment suit, and positively enacts that every step taken thereafter in the suit shall be deemed within the court's jurisdiction. The legislature of New Mexico thereby remitted the matter of writs, subsequent to the first, to the discretion of the court. Crepps vs. Durden, 1 Smith's Leading Cases, 1009; Bruce vs. Osgood, 56 S. E. 25; Simmons vs. Saul, 138 U. S. 439; Drake on Attachment, Sec. 447-8; Colfax vs. Richardson, 54 Pac. 359; Paine vs. Moreland, 15 Ohio, 445; Fed. Cas. No. 10613; Jackson vs. Smith, 22 N. E. 431.

IX.

Cases heretofore relied on by Dye et al, appellees here.

The case of Smith vs. Montoya, 3 S. M., 13, is not a case of collateral attack, and, therefore, is not in point here. The court in that case, on page 20, says: "As no judgment could be legally rendered against Smith as garnishee until after judgment had been rendered against the defendants in the action in which he was summoned as garnishee, it follows that the garnishee had the right, as a matter of defense, to show, either by the record, or, if the record was silent, by other competent proofs, that the judgment was void for want of jurisdiction."

Can it be supposed that this court would have said, in a case of collateral attack on a judgment, that the party attacking the judgment had a right "to show by the record, or, if the record was silent, by other

competent proofs, that the judgment was void for want of jurisdiction", in the face of Voorhees vs. The Bank, in 10 Peters.

Again the court says at page 23: "And as a legal judgment against the attached property was a necessary prerequisite to a valid judgment against the garnishee, it further follows that the final judgment rendered against the garnishee, Smith, was premature and unauthorized." And as if to remove all ground from the appellants to contend that that was a decision by this Honorable Court in a collateral attack on a judgment, the court in the last clause of that opinion reverses the judgment in the principle case and remands the cause with instructions to the lower court to proceed to a proper judgment against the defendants before giving a new trial to the garnishee, Smith. In other words, this court reversed the judgment itself, which it is claimed by appellants was collaterally attacked.

The very essence of a collateral attack on a judgment is that the court in which such attack is made, has no power to correct, or control over, such judgment. The appeal of garnishee, Smith, was a direct attack on the judgment against the principal defendants, and he procured the reversal of that judgment. "To constitute a direct attack upon a judgment, it is said, it is necessary that a proceeding by institution for that very purpose."

1 *Black on Judgments, Sec.* 252.

The attachment suit in Taliaferro vs. Dye was commenced in March, 1898, under the practice act, or code of 1897. Sec. 2685 of the Compiled Laws of 1897 contains that practice act or code, and sub. sec. 24

prescribes the form of publication notice in all civil suits then pending or thereafter to be commenced. This language includes attachment suits. All possible doubt as to whether it was intended to include publication notices in attachment proceedings is removed by sub. sec. 175, which excepts, expressly, attachment writs from the operation of the practice act. That leaves sub. sec. 24 applicable to publication notices in attachment proceedings, under the familiar rule of construction, *expressio unius est exclusio alterius.* But section 6 of chapter 75 of the Acts of 1899 makes certain that the contention of appellees on this point is correct. Said chapter 75 amends the practice act, or code, of 1897, and excepts from the operation of that practice act, all attachment proceedings. But the attachment suit of Taliaferro vs. Dye was commenced after the practict act was enacted, and was finished before said amendment was enacted in 1899. Sub. sec. 24 therefore controlled.

The case of Harris vs. Hardeman, referred to as a decision of the Supreme Court of the United States, is not cited by page and volume; but it is not an attachment suit, nor a proceeding in *rem,* but a partition suit and the decree was a personal one. It is not in point here.

Likewise the case of Thatch vs. Powell, 6 Wheat. 119. That was an extraordinary proceeding, under a special statute, in which all the authorities hold that every step taken by the court in its exercise of the jurisdiction, specially conferred, must appear of record. Voorhees vs. Bank, 10 Peters, and Cooper vs. Reynolds, above cited, fully discriminate these and similar cases from the case at bar.

So the cases of Cowdery vs. Town of Caneadea, 16 Fed. 532, and Gray vs. Larrimore, 10 Fed. Cas. 1028; they are not in point here; they were personal decrees.

The case of Galpin vs. Page, 18 Wall. 350, so much relied on below, by defendants in error, was discussed and fully considered by the court below. It was not a proceeding in *rem*, but was an effort to bind by personal decree a non-resident infant defendant. The court held that this could be reached on collateral attack because the record of the judgment collaterally attacked showed conclusively that jurisdiction had not been acquired for such a purpose. The case is not authority in the case at bar. It will be found upon inspection of the authorities cited below by defendants in error, upon this question of the notice by publication, that, so far as collateral attack is considered, they either relate to probate courts or other inferior tribunals; or, in the case of superior courts, they relate to cases where the want of jurisdiction affirmatively appeared—and conclusively—in the record itself; or they relate to cases where constructive service was attempted to be substituted for personal service; where a decree *in personam* was sought. None of them relate to judgments or decrees *in rem*, such as our attachment proceeding against a non-resident has been held to be. Many cases cited by appellants are cases of direct attack, which are not in point; because many errors or irregularities that would be held to render the proceedings void (loosely using the word) in a direct attack would not be held available in a collateral attack.

Cases cited below by defendants in error as to alias writ of attahcment.

The citations as 1 Shinn, sec. 8; 1 Wade, Secs. 2, 3, 4; Waples 7; and Dennison vs. Blumenthal, 37 Ill. App., all relate to direct attack and not to collateral. They simply state the law that in a direct attack by motion or appeal in the case itself, attachment proceedings will be quashed where they fail to strictly follow the requirements of the statute. But it is elementary that many errors and irregularities which would be fatal under direct attack, can not be considered at all where the attack is collateral. The only error or irregularity in attachment proceedings which will be fatal under collateral attack, is one so serious as to render the judgment absolutely null and void, because entirely outside of the jurisdiction of the court, as *coram non judice*.

II.

ESTOPPEL.

Defendants in error are estopped, even if the said attachment proceedings were null and void and subject to collateral attack.

The errors assigned upon this second defense of estoppel are those numbered 13 to 20 inclusive in the assignment of errors (R. p. 263).

The opinion of the Supreme Court of New Mexico on the question of the estoppel claimed is found in R. p. 269. It was also a majority decision by the court; but the two dissenting judges did not file a dissenting opinion on this question of estoppel.

As the application of the principles of equitable estoppel depends upon the facts of the particular case under consideration, it will be necessary to clearly set forth the facts.

X.

ABSTRACT OF THE EVIDENCE FOR DEFENDANTS.

John H. Robertson (R. 125) testified that he had several conversations with plaintiff B. H. Dye at White Oaks; Dye said he once owned an interest in the Compromise mine, and lost it because of his inability to do the required assessment work; also said, after Crary and Heiniman made the rich strike, that he was glad old man Crary had struck it, as he had worked hard and spent his money in good faith; that he (Dye) owned an adjoining property, which Crary's strike would benefit; that he was watching things very closely as Crary's work progressed; that he (Dye) was indebted to the Taliaferro people, and the Taliaferro people had taken his interest in the mine for said debt.

W. A. McIvers (R. 128), testified that on the 26th of November, 1900, Dye said to him, in the presence of William Despain and others, that he thought the Compromise mine at White Oaks would some day be a great mine; that he (Dye) had at one time owned five-sixths of it, and that he had let his interest in it go by paying a debt with it, and that he thought at the time that it was well sold, on the showing then on the mine, as the ore chute on the mine had not then been discovered; that he (McIvers) thought the mine worth $50,000.00 on November 26, 1900, as the result of the work that had been done by Heiniman and Crary.

W. M. Despain (R. 135) corroborates testimony of W. A. McIvers.

W. R. Fuston (R. 136) testified that he was the

miner who, while working for Heiniman and Crary, made the rich strike on the Compromise mine; the strike was made on August 22, 1900; that plaintiff Dye came to see the rich strike on August 25th, 1900, and conversed with the witness at that time; asked for and got specimens of the ore; took them away with him; asked witness to help him trace the course of the vein, because, as he said, he owned the Little Nell, adjoining, and wanted to see if the rich vein would, on its strike, go through his Little Nell; that he once owned an interest in the Compromise, but lost it through a debt hanging over the property, due to Taliaferro; that Taliaferro had attached the property, and it was sold at sheriff's sale to satisfy the claim; that he was glad Heiniman and Crary had made a good strike; that while he had no interest in the Compromise, he did own the adjoining claim, and the value of the latter would be enhanced; that he would like to see Heiniman and Crary do well for that reason; had another conversation with Dye within a week after the one detailed along the same lines, in the same strain; repeated to Crary what Dye had said; he was away at the time; when he came home, in a day or two, told what Dye had said; Dye was on the property frequently after that, with Heiniman and Crary—along from time to time until the suit was brought and the mine shut down.

Mark Thomas (R. 143) testiged that after the rich strike was made Dye told him that he (Dye) had lost the Compromise through failing to do his work; that after it became a good mine he wished he had it yet. Conversed with Dye may times about it.

Frank Alexander (R. 144) testified that he was

present at a conversation between Heiniman and Crary and plaintiff Dye at the shaft of the Compromise mine, after or about the middle of October, 1900, didn't remember the words of conversation, as he was at work, but the subject of conversation was in regard to the mine, as to the conditions and as to the boundaries in general in regard to the condition of the mines and the property at that time; Heiniman said to Dye, "Professor, I am glad that we called or asked you in regard to this, for I believe that you know more about this than anyone else"; had several conversations with the professor in regard to the mine; he has often said that he wished the mine well, as he had once owned it; yet he had no ill-feeling or anything towards these people, and wished them well, wished them success; afterwards, in April, 1901, after the suit was brought, Dye offered a position to work; then spoke about this property again, that he had unfortunately let go by reason of being cramped for money, but that he hoped to regain it.

John A. Haley (R. 170). (Will refer only to certain portions of this witness' testimony bearing on the point of estoppel.) At page (Record 172) testifies that Dye said to him, after this suit was brought, that after he returned to White Oaks in 1899 he found other people in possession of this property and he let the matter go along without taking any steps until 1900 he saw an interview with Jones Taliaferro which made him mad, and he began studying over the matter, and that perhaps Wharton might have made a mistake in the suit, and he looked the matter up, and found it in effect so, and brought the suit; and that he probably never would have brought this suit but for this incident in the paper.

R. E. Lund, (R. 178) testified that he was employed in September or October, 1900, by Heiniman and Crary, as a lawyer, to examine the title of the Compromise mine, which Heiniman and Crary were then working under bond and lease.

John A. Haley, recalled (R. 199) testified to publishing in his paper notice of forfeiture by T. C. Johns to B. H. Dye, of latter's interest in Compromise mine for failure to pay for assessment work for 1898. Copy of Notice, (R. 201).

John A. Haley, recalled (R. 240) testified that both Johns and Walsh, (John's agent) came to his office to deliver him said notice of forfeiture to be published.

Thomas H. Walsh, (R. 173)testified that he did the assessment work on the Compromise mine for 1898 as agent for T. C. Johns, manager of the Apex Mining Co., which owned one-sixth in interest therein, Dye owning five-sixths. Dye did no work; published notice of forfeiture against him; received payment before forfeiture took effect from Jones Taliaferro—receipt for same, Defendant's Exhibit 1. (R. 175) Dye did not do nor offer to do any assessment work on that mine for 1899 or 1900.

J. E. Wharton (R. 180) testified that he was attorney for Taliaferro in the attachment suit against Dye wherein the Compromise mine was sold; as to the circumstances under which the alias writ of attachment was issued, and that his recollection was that a second or alias publication was made.

Jones Taliaferro (R. 182) (one of the defendants, plaintiff in the attachment suit vs. Dye in which the mine was sold under the alias writ) testified that he left White Oaks on the first day of October, 1900, for

the east, and gave the interview to the El Paso paper, as he passed through there in "the first days of October"; purchased Dye's interest in the mine at attachment sale; gave the bond and lease to Heiniman and Crary, June 5, 1900, and gave them possession at once. Copy said bond and lease, as Defendant's Exhibit 4, page (R. 186). Delivered them deed and received the purchase price of $1,500.00 on November 1st, 1900; bought back an interest in 1901; Dye, after his return never spoke to him about the mine or the sale of it, or the debt for which the mine was attached, and never offered to do the assessment work for 1899.

E. Heiniman, one of the two defendants at the inception of this case, testified (R. 147) that he and H. C. Crary took a lease and bond on the five-sixths interest in the Compromise mining claim from Jones Taliaferro (Deft.'s Ex. 4, R. 90), on June 5th, 1900; at once took possession and went to work; were to pay $1,500.00 for the said interest in six months, if they bought under the bond; did so buy, and paid the $1,500.00 in cash on Nov. 1st, 1900, taking deed to the property from said Taliaferro (Ex. 5, R. 91); that B. H. Dye (one of the plaintiffs) was working on a claim in his charge, called Lady Godiva, from a few days after they begun their work on Compromise, until shortly before they bought under their bond on Nov. 1st, 1900; Lady Godiva is just across a gulch from Compromise, a few hundred yards distant and in plain view; to and fro, up and down said gulch, to White Oaks at night and back to work in the morning, they frequently met Dye, often talking with him about their work on Compromise; he often, almost daily, visited them at their work in Compromise; they made the big

strike on Compromise the latter part of August, 1900; Dye knew all about their bond and lease on Compromise, as well as they did, from frequent conversations; after their rich strike he (Dye) visited the Compromise more frequently than before; that Dye so visited said mine on Oct. 23rd, 1900; while there in the presence of Mr. Alexander and Mr. Crary, I told him that I was about to make payment for the property in full, and I asked him if he knew of any conflicting claim or any other claims on the Compromise. He immediately answered there was. The Scranton claim on the west took off about a hundred feet, and he said as to other claims there would be nobody but myself. And he says, I have allowed all my time to lapse and I have no claim whatever. With that he wished me success, and hoped that it would prove to be a good mine. He says if it does, it is bound to benefit me, because I own an interest in the Little Nell claim just north of you, which is only 155 feet north of the Compromise shaft (R. 150).

Q. "What reply, if any, did you make to Dye's statement as to the title which you have just mentioned? (Objection and exception.)

A. As I expressed my gratification, and told him that I was glad to see that we were working in harmony in the camp, etc. Well, he says, I wish you the best. I hope you make a million out of it.

Q. State whether or not if Dye had told you not to make that payment, as he was going to try to recover the mine, whether or not you would have made the payment?

(Objection and exception.)

A. No, I would not."

Witness, continuing, testified; that he had had much

experience in examining and estimating the value of mines, and that said mine was well worth, at the time this suit was brought, one hundred thousand dollars; that their strike and the development work done by him and his partner on it had given it this great value in seven months; that he did not know that this suit was even contemplated until he was served with the papers; that Dye visited the mine with the same frequency, after they had bought the mine as before; he so visited it and their workings the day before the papers were served; that Dye during his many visits to them on said mine, never intimated anything as to his claim against the mine, or his intention to assert any claim, and never gave them any warning; but always wished them the best, saying it was one of the brightest prospects in the camp, and that he was glad that he (Heiniman) was one of the owners; Dye was there in White Oaks also the latter part of the year 1899; that he saw him almost daily.

"Q. State whether or not you expended this four or five thousand dollars in the development of the Compromise mine, and made the final payment of $1,500.00 as you have testified, in reliance upon Mr. Dye's conduct, and assurance given you from time to time as testified, that he had or claimed no interest whatever in this property? (R. 153.)

(Objection-exception.)

A. I did. We were very warm friends at the time, and was up to the day I was served with the papers after this suit had been brought."

Witness (continuing) said; that Dye knew of the value of the big discovery, and got such knowledge from time to time after such discovery; they had their assays made at the works of the Lady Godiva where he

was working; the discovery of the rich ore was made the latter part of August, near the first of September.

On cross-examination (omitting what is but a repetition of his direct testimony) this witness Heiniman testified; that Dye was working on Lady Godiva until about thirty days before this suit was brought.

"Q. When was the first conversation you ever had with Mr. Dye about any adverse claim or title to that of Jones Taliaferro to the Compromise claim?

A. It was about the 23rd of October, 1900. That was the time I asked him the direct question.

Q. Was that the only time that you ever asked him directly whether he or anybody else ever had any adverse claim to the Compromise?

A. Yes, sir; that was the first time, because he had voluntarily told me and assured me, time and time again, both by action and by conversation, and told me that he had once owned an interest in the claim, and had let it go for a debt." Objection—exception. (R. 157.)

Continuing, witness said; that he could not remember date of more than one conversation—(that of July 25th)—besides that detailed of Oct. 23; have had much to do with mining titles, bonds and leases; not in the habit of relying on what was told him, but relied also upon examining the record, and getting information from parties interested in the camp; in this case had an abstract made by the County Recorder; had title examined by Attorney R. E. Lund prior to Oct. 23, some time in September, after the rich strike of ore was made; but after the voluntary statement by Dye was made (July 25th); Attorney Lund reported that he examined the records carefully and paid the clerk $4.00 to assist him to go through the records,

and he reported to them that all the proceedings of this Sheriff's sale were regular and that everything was of record, and that so far as that was concerned, they would be perfectly safe to handled the property.

"Q. Now, when you came to handling the property, and making this payment, did you rely upon Dye's statement to you, or the opinion of your attorney and this abstract? (R. 159)

A. I relied upon all three. But his visiting the mine every day, it aroused a curiosity in me to know what he was coming there so often *before* (for?); while I felt that it was nothing but friendship, still I wanted to be safe, and that is why I asked him the question; I always want to keep out of trouble if I can."

Again:

"Q. You mean somebody else had prospected it and given it up? (R. 160)

A. Mr. Dye had prospected it and given it up.

Q. He gave it up by its being sold under attachment, didn't he?

A. Yes, sir.

Q. Did you ever know of his giving it up any other way?

A. No, sir; I did not.

Q. You say that $500 is more than any experienced mining man would have paid for it when you went on it?

A. Yes, sir; I do.

Q. What was there that induced you to go on it and expend four or five thousand dollars?

A. After prospecting three days and finding the large ore, pay ore chute, induced us to go ahead with the work."

Again (R. p. 160):

"Q. Now, you say he gave you no intimation of his intention to bring this suit, but always wished you the best; state exactly what he said by way of wishing the best, and when he said it?

A. Well, he wished me success, and hoped that we would open up a big mine there, at the time that he voluntarily told me that he had let the claim go for a debt.

Q. That is the first occasion that you have referred to?

A. Yes; that was in July, about the 25th, as near as I can tell.

Q. When did he state anything of that kind afterwards?

A. He stated something of that kind at the shaft on or about the 23rd of October, and at that time he assured me that he had no claim whatever in the Compromise."

Continuing, witness said; that many other times Dye wished him success,—once as late as December; other parties had become interested with himself and Crary in the mine since the suit began. (The balance of Mr. Heiniman's cross-examination relates to an alleged attempt at violence against Dye's person by witness and others interested in the Compromise in White Oaks.)

H. C. Crary, the other of the two defendants named in this suit when filed, testified (R. 247): that in conjunction with E. Heiniman he took a bond and option on the Compromise mining claim from Jones Taliaferro on June 5th, 1900; immediately got possession and went to work in a few days; took up said option on Nov. 1st, 1900, making final payment of the purchase price of $1,500.00 on that date; continued unin-

terruptedly on development work on said claim from the beginning of work until about Jan. 17th, 1901, when the summons in this case was served on him, when work was stopped; spent in that time about $6,000.00 in actual development work on the claim; that during said development work, Dye was superintending work on Lady Godiva mine, and doing some work on Little Nell mine; that he saw Dye frequently during that time; that he (Crary) had his own team, and Dye often rode with him between their work and town; that he (Dye) was often at the Compromise while such work was going on; that he (Crary) told Dye of their bond and option and the way they were working the Compromise mine; that the first conversation he had with Dye was a few days after the rich strike was made, which was late in August; the strike was made by witness W. F. Fuston, while he (Crary) was absent a few days; when he returned Fuston told him Dye had been there; that the day after he returned from this absence, he was at the mine when Dye came to visit, when he showed Dye the indications he had previously discovered that led him to take the lease and bond from Taliaferro; that Dye said (R. 249) that "he (Dye) had owned the property, and that he knew of this ore in the mouth of this old tunnel and had some assays out of it, but that it was not of sufficient value to warrant his working on it, specially as at that time there was no way to treat those sulphides, even if they had been worth fifty dollars a ton; that he had done a great deal of work there, but had failed to catch any ore of sufficient value to warrant working the claim; that he had allowed his time to expire and hoped that we would do well on it; that he made no claim to it, as he owned the property on the other side

of the gulch; and if we could get good ore there, it would make his Little Nell property more valuable. I think that is probably all the conversation that occurred at that time. I was elated over the discovery of this ore, both of us talked a good deal and both of us felt good."

"Q. Do you remember a conversation between Dye and yourself and Heiniman, at which one F. D. Alexander was present, who was working for you?

A. I do.

Q. About when was that conversation?

A. I don't remember the exact day.

Q. Was it before or after this option was taken up and this mine paid for?

A. It was before.

Q. Give that conversation, as near as you can remember it, stating how it came up, if you know?

Objection—exception.

A. Mr. Dye was there, and Mr. Heiniman asked him, I can hardly remember the exact words, but in substance whether the title to this property, the Compromise, was all right. Mr. Dye replied that there was some drawn ground between it and the Scranton on the side, that would belong to the Scranton. It was an over-lap; that there could be no other claimant, unless it was him, an dhe had allowed his time to lapse and made no further claims to the property. He also added, I hope you will do well with the property and make lots of money out of it."

Again (R. 250):

Q. If you had learned at that time, you and Heiniman, from Mr. Dye, that he expected to assert any claim against the property, state whether or not you would have completed the payment for it?

Objection—exception.

A. I don't think we would.

Again (R. 251):

"Q. State whether or not, that you spent the money that you have mentioned in developing said property, and in finally paying for it and taking a deed to it, in reliance upon Mr. Dye's conduct while you were operating the mine under that bond and lease?

Objected to as irrelevant, and that a party to a suit cannot make evidence for himself, in his own favor, as to what his intentions were.

Same ruling.

Exception.

A. We done the work, and paid the payment on the repeated assurance of Mr. Dye that he made no claim to it, and would not have touched the property in the first place had we know that he made a claim or had a claim.

Q. State whether or not, Mr. Dye, at any time, while your operations were going on under that bond and lease, ever did anything to your knowledge, or said anything to you, indicating that he had or would make any claim on the property, or give you any warning in any other way?

Same objection and it is also leading.

Objection sustained.

Defendant excepts.

A. He did not.

Q. What was the cash value of the Compromise in your opinion just before your operations began on it under the bond and lease, before you discovered any indications of ore?

Objected to as immaterial and irrelevant, answer heresay.

Objection sustained.

Defendant excepts.

A. I don't know that it had any cash value. If I had not discovered ore within a few days, I would have dropped the property.

Q. What was the property worth, at the time you shut down, after the suit was brought?

Same objection.

Objection sustained.

Defendant excepts.

Q. What is your opinion as to what it was actually worth?

Same objection.

Objection sustained.

Defendant excepts.

A. (As read to the jury by Mr. Fergusson.) I think it was worth $45,000.

Q. You have detailed two conversations with Mr. Dye relative to your bond and lease, and the title to the mine; state whether or not there were others, long or short, during that time?

A. He was often there, often rode down to town with us, and during this time we often talked together in relation to the property. In which conversations he always gave me the same impression, as in the two conversations." * * *

Cross-examination of witness Crary (R. 252) is substantially a repetition of his direct testimony.

Jones Taliaferro (continuing) (R. 188), said that his deed conveying the interest in question was made and placed in escrow Oct. 1st, and afterwards, during his absence, delivered by the holder to Heiniman and Crary on the latter paying $1,500.00 to the bank to his credit; at page 190 (R) says he repurchased an inter-

est in the Compromise mine in the spring of 1901, after this suit was brought; that he did not buy back into the mine particularly because of the rich strike, but Heiniman and Crary urged him to buy in again, in order to fight the case; and he bought in again because it was a good investment; mentioned the present owners as Fergusson, Mayer, Spence and himself,—as having bought from Heiniman and Crary.

"Q. (R. 190) Mr. Dye has testified that he returned to White Oaks in April, 1899. What, if anything did Mr. Dye say to you, after returning, about the Compromise mine of which you were then in possession, or with reference to the debt that he owed you, for which it had been sold under attachment?

A. He never mentioned it to me at all.

Objection—exception.

Continuing: that he was in possession of the mine, with his co-tenant of the other one-sixth from his purchase of the mine in February, 1899, and was in White Oaks most of the time after Dye returned; that he did the assessment work for 1899 and 1900, and Dye never did nor offered to do, any of it; nor asked permission of him in possession.

(Here testimony offered by defendants ruled out.)

Again (R. 193):

"Q. State whether or not after Mr. Dye returned to White Oaks in April, 1899, and found you in possession of the mine, he offered to repay you the debt for which you had sold the mine?

Objection—exception.

A. He did not.

Q. State whether or not, within twelve months after that sale, he offered to pay you the amount of that

judgment and redeem the mine from you? (R. 193)

Objection—exception.

A. He did not."

He further said (R. 194) that Heiniman and Crary had no further interest in the mine, and that the parties named above acquired all such interests with the knowledge of the pending of this suit.

Defendants had Mr. Childers, attorney for plaintiffs and co-owner under and with Dye, sworn in the effort to prove the exact date of the first letter Dye wrote him (Childers) asking his opinion as to the sufficiency of said attachment proceedings. This examination of Mr. Childers and of Dye in connection therewith is found in the record, pages 201-206 inclusive.

Defendants also introduced in evidence parts of the testimony of said Dye given upon the first trial, as admissions against interest. A summary of such testimony so introduced by defendants (plaintiffs in error here) as follows:

Benjamin H. Dye (R. 208) testified that he returned to White Oaks on the 27th or 28th day of April, 1900; maybe the 22nd; that his business has been principally mining, but also a practicing lawyer since 1864; was admitted to practice in New Mexico in 1883 in the district in which Lincoln County is situated; and had considerable practice in that district since; did not do his assessment on Compromise claim for 1899, because he learned upon his return that the property had been levied upon and sold in his absence and that others were in possession of it; that he learned on his return that Jones Taliaferro was the person in possession of it; that he (Dye) never had any conversation with him (Taliaferro) about it; that he did not

offer to do his assessment work for that year (1899), that he did not attempt to go on the property for that purpose; that he knew under whom Heiniman and his partner Crary went into possession; that he learned that fact from Heiniman and Crary themselves; that such possession was under a bond and lease from Jones Taliaferro; that he saw them in possession and doing considerable work; he (Dye) was working that summer (1900) about a quarter of a mile from them; could see sections of their claim (Compromise) from his work; after they (Heiniman and Crary) made their rich strike, passed them frequently and had conversation with them; rode twice with them to and from town, to and from our work; maybe rode once or twice more. Continuing (R. 210-211) in these words:

"Q. But it was in conversation between these rides, and when you would visit the strike up at the mine, that you learned, as I understand you, that they were in possession of that claim and working it under a bond and lease, that is a purchase bond from Jones Taliaferro, who purchased it at a judicial sale made against you. That is when you got the impression, by conversation, as to the right they had to be on the claim?

A. I didn't contest their right on the claim. They were there talking.

Q. I just asked you if it was during these various talks on the claim and riding with them that you learned that they were working it under a bond and lease from Jones Taliaferro, after you got back, when you learned that Jones Taliaferro had bought it at this sale. That is when you got that impression?

A. Yes, sir; I couldn't designate any time or place

when they first notified me, that is, gave me notice; you understand it; somebody told me as a fact that they were at work and how—a friendly talk."

Q. And what did you say about wishing them success and hoping that it would prove to be a good mine, and that if it did it would benefit you because you owned an interest in the Little Nell just north of it?

A. At that time and long before Mr. Heiniman and Crary knew all about the relations of the Little Nell and the Compromise. Knew that I was connected with the Little Nell; we had talked about that fact, they had told me about the prospecting of the Little Nell, and had full information about all the relations existing then, and no conversation of that character was had *at that time,* none whatever; and for either of us to have had any conversation *at that time* on those subjects would have been entirely superfluous.

Q. I am asking you about those things to which I have directed your attention, Mr. Dye. The Little Nell was one of them, and the other one was about your claim to the Compromise?

A. Nothing was said.

Q. What was said about wishing him success?

A. Oh, that is possible; I wish everybody success, just the same as I wish everybody good morning and evening.

Q. What did you say about hoping he would make a good mine out of it?

A. I have no knowledge of any such remark.

Q. State whether or not you ever had any other conversation with Mr. Heiniman in which any such thing was said with reference to your interest in the Compromise?

A. I suppose so. I have no doubt it is true that I

have told Mr. Heiniman in various conversations that we have had upon all manner of subjects that I had at one time owned five-sixths of the Compromise mine. I have no doubt that I have told him, as I have told anybody else who made it their business to make inquiries of me, that fact.

Q. What fact?

A. That I had been the owner of five-sixths of the Compromise mine, and that I was sold out under attachment in my absence from the Territory.

Q. What time did you learn of this sale of your property under that attachment proceeding?

A. Immediately upon my return to White Oaks. (Motion to strike out—exception.)

Q. Did you examine the papers to see if it was regular?

A. No, sir.

Q. Were you surprised that your property had been sold?

A. I don't know that I can say I was surprised, but I was very much annoyed. I know that proceedings had been taken to divest me of everything that could be reached, my law office and my books and my library, and everything was gone.

Q. You knew that while you were gone?

A. That proceedings had been taken, particularly with reference to my law office, yes sir.

Q. How did you get that information?"

He answers that he did not remember whether by letter or newspaper clipping, or by the court's direction.

Then, as follows:

"Q. When you got back in April and learned that your property, this Compromise mine, had been attached and sold, what did you do about it?

Objection—exception.

A. Nothing.

Q. Nothing?

A. Nothing.

Q. Did you make no inquiries about the character of the proceedings that had been had against you?

Objection—exception.

A. No, sir.

Q. Didn't you ever examine the papers during that year of 1899?

Objection—exception.

A. No, sir; never have examinerd the papers up to today.

Q. When did you get the information on which you brought this suit?

A. On the 4th day of December, 1900.

Q. What led you to make inquiry or examination that resulted in your getting that information on the 4th day of December, 1900?

A. I think I can completely answer that by stating that it was the result of my own mental operations.

Q. Were those mental operations about these; that now these men have made this mine worth fifty thousand dollars, and I will go now and see if I can pick a flaw in that attachment case?

Objection—exception.

A. No, sir.

Q. What were they, then?

A. Well, I can explain that to my satisfaction; possibly to yours. You ask what they were?

Q. What were those mental operations that led you to make that examination on Dec. 4th, 1900?

A. They weren't made on December 4th.

Q. I beg your pardon; I thought you said so. When were they made then?

A. That is the time I got the information that induced me to act.

Q. How did you get that information?

A. I got that information in the shape of an opinion from my attorne ythat I had previously requested—by letter received on the 4th day of December, 1900.

Q. Who was that attorney?

A. Mr. W. B. Childers.

Q. When did you submit the case to him?

A. Well, I couldn't tell; a good many days before. Probably as much as two weeks before.

Q. Did you send him the papers in the attachment case for his examination and opinion?

A. No, sir.

Q. What did you do?

A. Nothing but write him for an opinion.

Q. What led you—what were the mental operations that led you to write the letter submitting it to him for an opinion?

A. Well, previous to my going away there was a law in force in New Mexico relative to attachment proceedings requiring that advertisement should be made in both languages. In certain cases, I presume, I have lost trace of that statute, as to whether it was still in force or not, during my absence, and never having seen this advertisement in this Compromise case, I did not know whether it had been advertised in both languages or not, but I was somewhat anxious to find out. That was one point.

Q. What other?

A. Another was that I had observed what I thought to be a looseness of practice on the part of the

attorney who had brought that suit. Then I was aroused by an interview appearing in the local paper there, copied from an El Paso paper, purporting to be an interview with Mr. Jones Taliaferro, the contents of which stunned me, and I became aroused about it.

Q. What time is that? When did you read that interview—give the date?

A. Oh, it was along in the fall, I should say, of 1900.

Q. Was it October?

A. I could not assign the month.

Q. You heard Mr. Taliaferro's testimony, didn't you?

A. I heard his testimony; yes, sir.

Q. That it was the first days of October?

A. I could not dispute Mr. Jones Taliaferro's testimony about that; he had opportunity to know, and I have not. Well, sir, reflecting upon these things it occurred to me that was my duty to myself to make inquiry as to the binding effect of the proceedings in that case. I made up my mind to do it, and did it by writing to Mr. Childers, and on the 4th of December I got his answer giving his opinion that I hadn't been divested of my title, and right there, without arising from my desk, I wrote him a litter giving instructions for the bringing of this suit.

Q. It was on the strength of that this suit was brought?

A. Yes, sir.

He then states in effect that he learned from Mr. Wharton himself (Taliaferro's attorney in the attachment suit) that he (Wharton) was such attorney; that he (Dye) had observed, or heard of, said attorney's looseness in practice long before, but he had it in mind,

as well as the provision of our statute requiring legal notices to be published in both (English and Spanish) languages about the time that Taliaferro's interview angered him. Then as follows (R. 216):

"Q. Mr. Dye, I would like to ask you this question: did any of those mental movements of yours that resulted in your submitting this case to Mr. Childers for an opinion occur to you before the discovery of the rich ore?

A. I think not.

Q. They all occurred to you after the rich ore was discovered?

A. I suppose in time; yes, sir.

Q. I want you to be positive about that?

A. Yes, sir; it required a considerable time afterwards.

Q. Well, about how long afterwards before you began to think on those points?

A. Oh, a month or so, probably; the discovery was made, according to testimony here, I think in August. In November I made up my mind to ask for an opinion, and did so.

Q. And those mental meditations had all occurred in the meantime?

A. Yes, sir."

Mr. Dye (R. 228) denies categorically the statement of witness McIvers that Dye had said to him (McIvers) on November 26, 1900, that he (Dye) consider that the mine had been well sold when Taliaferro took it for attachment.

Dye's weak denial of the testimony of Heiniman and Crary is found in R. 228 to 232 inclusive. But the Supreme Court of New Mexico, in its opinion found it to be a fact that Dye's testimony taken as a

whole, substantially agrees with that of Heiniman and Crary.

As to the testimony of the defendants' other witnesses, Robertson, McIvers, Dr. Spain, Fuston, Thomas, Alexander, Haley, Walsh and Taliaferro, Dye was questioned by his attorney, and answered as follows (R. 232):

"Q. Now, with reference to the statements attributed to you by Robertson and McIvers and DeSpain, and those other parties, I don't remember who they were,—Fuston,—state whether you ever made any such statements with reference to your title or interest in the Compromise, and if so, if you made any statements in that subject. What did you say?

A. Well, sir, I think I can answer that general question in quite a general way.

Q. That is what I am asking you for—a general answer.

A. Many people annoy me by inquiries for reasons of their own, I don't know why, about this sale of my property, and I had but one thing to say, and that was that I hadlost i t by being sold under attachment in my absence from the Territory, and no man or woman who states under oath as otherwise that I have made any other statement or representation about it, states that which is false."

II.

Dye and his privy, Childers are estopped in this suit.

The Supreme Court of New Mexico, in its opinion (R. 269), rests, its decision that no estoppel exists in this case upon the ground that Dye, during his course of conduct and his representations, did not have knowledge of the alleged nullity of said attachment sale.

But Dye, on arriving at White Oaks, in April, 1899, immediately learned all the facts as to the sale of his property under the attachment proceedings; that Taliaferro was the purchaser, and in possession of it; and he remained there in sight of the property, and close to Taliaferro's store, for more than a year before Heiniman and Crary took the bond and lease for the purpose of developing and purchasing it. During that whole year he did not speak to Taliaferro about the property, or the debt for which it had been sold, nor offer to redeem it, nor offer to save it from forfeiture for his failure to perform his assessment for 1898, nor offer to do his assessment for 1899. Nor did he examine the attachment proceedings under which the property had been sold. And when Heiniman and Crary took the lease and option from Taliaferro to work the property and buy it, he learned at once of this transaction, of Taliaferro's act of ownership in assuming to dispose of the property, and of the contemplated expenditure of labor and money by Heiniman and Crary in developing and buying the property. Still he said nothing to any of the parties concerned, nor did he examine the attachment proceedings. And after Heiniman and Crary went to work on the property, he himself went to work on another mining property of which he was in possession, just across the gulch from Heiniman and Crary and in sight of them and their work. And when Heiniman and Crary made a rich strike in August, 1900, on this property, Dye at once learned of such strike and visited it; and from that time on he showed the liveliest interest in the mine and its richness, visiting the scene of the operations very frequently, almost daily, until he commenced this suit in December, 1900, and had the sum-

mons served on January 17, 1901, when work ceased. Moreover, during the whole of the time from the commencement of their work, June 5th, 1900, till he brought suit, he met Heiniman and Crary very frequently, on the road between the town and the mines (about one mile) as well as on the mine, and learned from them all about their contract to buy the mine, its terms, and their hopes and prospects, spoke of the fact that he owned the adjoining claim, and spoke often of the fact that he once owned the claim they were finding so rich, but that he had lost it for debt; and made representations to them on Oct. 23, 1900, in response to the direct statement to him by Heiniman, on the property, that they (Heiniman and Crary) were ready to make final payment for the property, and in response to the direct question as to what reason, he knew of, why they would not get a good title to the mine, replied that he knew of no possible claim to the property affecting the title, except his own, and that as to that he would make no claim as his time to question the sale had lapsed.

Plaintiffs in error charge that Dye was guilty, from a point of time, soon after the rich strike was made, of intentional and fraudulent concealment from Heiniman and Crary of facts within his knowledge, which said Heiniman and Crary could not know, by the use of all the diligence which from the first they exercised in this matter:—which said facts (in Dye's breast alone) are either admitted directly by Dye, or testified to by witnesses whom he does not contradict on any one of the many occasions when he gave testimony.

These facts, showing such fraudulent concealment, are as follows:

1. Dye began to question, in his own mind, the sufficiency of the attachment proceedings and sale, soon after ("a month or so" in Dye's own words) the rich strike was made on the property by Heiniman and Crary, on August 22nd, 1900, and not later than October 1st, 1900.

2. Previously, soon after his return to White Oaks, in April, 1900, Dye had talked with plaintiff's attorney in said attachment suit, and about the same in detail enough to learn who was plaintiff's attorney in said suit.

3. As found by the Court, on Dye's admission, the latter did, on Nov. 20th, 1900, write to his attorney asking for an opinion upon the sufficiency of said attachment proceedings and sale "to divest him of title".

4. On Dec. 4th. 1900, he received by letter such legal opinion to the effect that said attachment proceedings and sale were not sufficient in law "to divest him of title".

5. On Dec. 4th, 1900, "without arising from his desk", Dye, by letter, instructed his attorney to institute proceedings to recover said property.

6. Said suit (this suit) to recover said property was instituted on Dec. 28th, 1900 (clerk's filing mark, R. 30).

7. Summons was served upon defendants, Heiniman and Crary, on Jan. 17th, 1901 (Sheriff's return R. 31).

8. Heiniman and Crary continued their labor and expenditures in the development of said mine until Jan. 17th, 1901, when process was served upon them, when they ceased such operations.

9. Dye visited said mine and such development work, and saw and conversed with said Heiniman and

Crary, frequently, during the months of September, October, November and December, 1900, and just as often after Nov. 1st, when final payment was made, as before.

10. Dye gave no notice at any time to Heinimann or Crary, or either of them, and apparently concealed from everybody, the fact that he began to question in his own mind the sufficiency of said attachment proceedings and sale prior to October, 1900; nor that he wrote to his attorney to obtain his opinion as to such sufficience 'about Nov. 20, 1900" (as found by the court); nor that he received from his said attorney an opinion to the effect that such proceedings were insufficient and void on Dec. 4th, 1900, and immediately gave instructions to said attorney to institute this suit.

THE PROOF OF THESE FACTS.

1. At R. 227 (folio 351) Mr. Dye, when asked how long after the rich strike was made on the mine it was when he began to question in his mind the sufficiency of the attachment sale, answered: "Oh, a month or so probably; the discovery was made, according to the testimony here, I think, in August. In November I made up my mind to ask for an opinion, and did so."

Q. And these mental meditations occurred in the meantime?

A. Yes, sir.

Again (R. 214, folio 330), after stating the two points of inquiry that he remembered within a month or so after the rich strike, viz: that our statute had once required notice by publication to be published in both languages, and that the attorney for the plaintiff

in said attachment suit, was loose in his practice and might have made a mistake in said attachment proceedings, said (R. 214, folio 331): "Then I was aroused by an interview appearing in the local paper there, copied from an El Paso paper, purporting to be an interview with Mr. Jones Taliaferro, the contents of which stunned me, and I became aroused about it.

Q. What time is that? When did you read that interview,—give the date?

A. Oh, it was along in the fall, I should say, of 1900. I could not assign the date.

Q. Was it October?

A. I could not assign the month.

Q. You heard Mr. Taliaferro's testimony, didn't you?

A. I heard his testimony; yes, sir.

Q. That it was the first days of October?

A. I could not dispute Mr. Jones Taliaferro's testimony about that; he had opportunity to know, and I haven't," etc.

Mr. Jones Haliaferro (R. 182, folio 281) on this point said:

"Q. With reference to an interview that was spoken of a while ago, did you hear the testimony of Mr. Haley?

A. Yes, sir.

Q. Where were you in 1900?

A. I left White Oaks about the first day of October, 1900, on my way east, and stopped a day in El Paso.

Q. State when the interview that has been spoken about occurred?

A. It was during the first days of October, 1900."

John A. Haley, detailing a conversation with Dye,

was permitted by the court to testify as follows (R. 172, folio 267):

"When he (Dye) come through Denver (in 1899) and failed to fine Johns, he came on to White Oaks and there found that Johns had not paid Gumm the money, hadn't taken the mine, or his interest, and found the property in other peoples' possession, and then just let the matter go along without even taking any steps, but later on, I think in the year 1900, he saw an interview in the El Paso paper, I think the Industrial Record, and he said no names were called, but everybody in White Oaks knew to whom it referred when the mine had been sold for debt, and said that it made him mad, and he began studying over the matter, and that perhaps Wharton might have made a mistake in the suit, and he looked the matter up, and found it in effect so, and brought the suit. And as near as I can remember, his remark at that point was that he probably never would have brought this suit but for this incident in the paper."

2. R. 215 (folio 332) Mr. Dye, when asked how he knew that the attorney, of whose looseness in his practice he had heard, was Taliaferro's attorney in the attachment suit, answered: "I expect I learned that as a definite piece of information from Mr. Wharton himself."

"Q. When?

A. I suppose it was shortly after my return. I went to Mr. Wharton for information with reference to my law office library, books and papers, to see what he knew about it, and I suppose we discussed the matter quite fully. At least I knew either from him or others that he had acted as attorney."

3. R. 225 (folio 347) Mr. Dye, when he submitted

the attachment case to Mr. Childers for an opinion, replied: "Well, I could not tell; a good many days before; probably as much as two weeks."

4. See R. 224 (folio 346), where Dye testified that he received the opinion of his attorney, pronouncing the attachment sale void, on Dec. 4, 1900.

5. See R. 214 (folio 331), where Dye admits having directed his attorney, on Dec. 4, 1900, to institute this suit.

6. See R. 30, where appears the declaration in this suit, with endorsement showing that the date of its filing as Dec. 28, 1900.

7. See R. 31, where appears the summons with the sheriff's return of service thereon, showing that service was made on Jan. 17, 1901.

8. R. 140 (folio 215) witness Fuston said:

"Q. The Compromise mine didn't shut down until this suit was brought?

A. No, sir.

Q. If the service was made on the defendants on the 17th day of January last (1901), when did the mine shut down?

A. Just the day; I think it was the 21st; I ain't positive about that."

Also, R. 247 (folio 384) H. C. Crary testifies thus:

"Q. How long did the work continue under your operations?

A. Until some time about the 17th or 20th of January, 1901."

Again, R. 252 (folio 392) the same witness said:

"Q. When did you first learn, after you finally paid for the property, November 1st, 1900, that Dye claimed, or was asserting, any interest in that Compromise claim?

A. On the 17th day of January, 1901, when we were served with the summons."

At R. 151 (folio 233), Heiniman replied to the same question thus: "A. Not until I was served with papers by the sheriff in this case."

9. R. 152 (folio 234), Heiniman testified as follows:

"Q. State whether or not Mr. Dye visited the Compromise while you were working it, after November 1st, 1900, when you took up your bond and option and received your deed?

A. He visited us with the same frequency that he had, up to the day before I was served with the papers. He was on the ground the day before I was served."

Again, R. 157 (folio 242), on cross-examination, same witness:

"Q. You say he (Dye) visited the mine every day nearly?

A. Frequently; I wouldn't say every day. There would be two or three days—frequently.

Q. Would you say that he visited the claim fifteen days out of every month up to the first of November, 1900?

A. I wouldn't be positive about that, but of course there would be days that I would be gone for a few hours at a time, and when I would return the boys would tell me that he had been there, if I did not happen to be there. I should judge that he would average fifteen days in the month, and that wouldn't miss it very far. And in return, I visited his office at the Godiva mine, as often as he would visit my mine; we were back and forth together." * * * "I would be right positive of ten days of my own knowledge, from the time we discovered the ore."

Crary, R. 248 (folio 385), said:

"Q. State whether or not he (Dye) visited the mine while you—working during that time, and if so how frequently?

A. He was there often."

Again, R. 251-2 (folio 391):

"Q. You have detailed two conversations with Mr. Dye relative to your bond and lease, and the title to the mine,—state whether or not there were others, long or short, during that time?

A. He was often there, often rode down to town with us, and during this time we often talked together in relation to the property. In which conversations he always gave me the same impressions as in the two conversations."

10. (R. 152, folio 234), Mr. Heiniman testified in reply to the question whether or not Mr. Dye at any time intimated anything as to his having a claim against the mine, or his intention to assert any claim, or gave them any warning whatever of the suit that has since been brought, replied:

"A. None whatever. On the contrary he always wished us the best.

"Q. What did he say or do, if anything, relative to encouraging you to go ahead with your enterprise on that claim?

A. He always expressed himself, while visiting the mine, that it was one of the brightest prospects in the camp, and that he was glad I was one of the owners."

Heiniman again (R. 160, folio 247) on cross-examination testified that Dye gave him no intimation of his intention to bring suit.

Heiniman also testified (R. 153, folio 235), that he

paid the $1,500 purchase of the mine and spent in all four or five thousand dollars on its development in reliance upon Dye's conduct and repeated assurances that he had or claimed no interest in said property.

Crary testified (R. 168, folio 259) that if he and Heiniman would not have paid the $1,500 purchase price if they had learned from Dye that he had any claim to the property and (same page, folio 260). Crary also said that Dye never at any time during their operations said or did anything indicating that he had, or would make, any claim to the property and never gave them any warning in any other way. As late as Nov. 26, 1900, after he had ordered suit, he spoke to witnesses McIvers and De Spain of having let the mine go for debt. So this undisputed evidence tends to prove that Dye intentionally concealed from Heiniman and Crary,—and lied when necessary to protect such concealment,—the fact that he began to question in his mind, the sufficiency of said attachment proceedings "a month or so after the rich strike" of Aug. 22, 1900, a period of nearly four months, or till Jan. 17, 1901; also, the further fact, that an interview of Jones Taliaferro which he read in the first days of October aroused him to an active investigation of the sufficiency of said attachment case; also, the further fact that on Nov. 20, 1900, two months before Heiniman and Crary finally got knowledge of his intention (to-wit: Jan. 17, 1901) he wrote to his attorney submitting the sufficiency of said attachment proceedings to other legal scrutiny than his own; also, the further fact that on Dec. 4th, 1900, a month and a half before the two miners who were developing said mine got notice of his movements against them, he received

legal advice that said attachment sale of his property was null and void; and the further fact that on Dec. 4th, the same day he ordered the bringing of this suit.

And yet all of these months Dye was in White Oaks, frequently visited the mine and inspected the work going on,—even up to Jan. 17, 1901, and frequently talked with Heiniman and Crary about his former interest in the property, their bright prospects of wealth, etc., and had every opportunity, as well as every obligation, as an honest man, to tell them of his operations, mental and otherwise, toward getting in shape to take the property from them, after their skill as prospectors, their labor and expenditures had made the mine worth from fifty to one hundred thousand dollars; and leave them to bear their heavy money losses of $1,500 purchase price and five to six thousand dollars which they had expended in developing the mine.

DYE'S ALLEGED WANT OF KNOWLEDGE.

The Supreme Court of the Territory of New Mexico in its opinion (R. 269) denying the claimed estoppel seems to base its decision on two consideration, to-wit:

1. That Dye was in ignorance of the void character of said attachment proceedings during the time of his conduct and representations.

2. That Heiniman and Crary had equal access with Dye to the record of said attachment proceedings, and equal opportunity and duty to ascertain their alleged insufficiency to support said attachment sale; and that they relied upon their lawyer's opinion in the matter, and not on Dye's conduct and representations.

I.

DYE'S IGNORANCE.

Said opinion does not discuss the fraudulent concealment (above discussed) by Dye of facts, which Heiniman and Crary could not know except from Dye himself. But even upon the grounds which said opinion does consider, we respectfully insist there is error; that Dye's negligence was so gross as to be fraudulent and to subject him to the charge of laches in waiting for the result of the efforts of Heiniman and Crary to make a mine of the prospect.

WHAT WAS IT DYE DID NOT KNOW?

He certainly had constructive notice of the suit, by the publication notice in the spring of 1898.

Also by the advertisement of the sale of this property in such suit in January, 1899; and by the publication of his forfeiture of said property for failure to do assessment work, the first three months of 1899.

And he directly admits that he got actual knowledge of all the facts on his return to the locus of the property in April, 1899.

The claim of ignorance is thus narrowed down to only this point: he did not know that the trial judge, in the attachment case, had made the alleged mistake of law and erroneously exercised his jurisdiction in ruling that the alias writ of attachment was authorized by our statutes, or was lawful under the inherent power of our District Courts under the Organic Act.

And was he not guilty of gross negligence in not finding this out?

When he returned and learned all the facts in April, 1899, the case was still a live one, *as to him*. He still

had eight months under our stautes in which to move to set aside the judgment for errors and irregularities; and ten months in which to redeem the property from execution sale. He did not even inspect the papers, though he could have done so by the expense of a postage stamp and the effort of a letter to the clerk. Even a layman is conclusively presumed to know the statutes.

Unless Dye had elected to abide by the sale, and had acquiesced in the payment of his debt to Taliaferro thereby, was it not gross negligence in him to fail to examine the attachment proceedings during the year after his return which elapsed before Heiniman and Crary too kthe bond and lease? And was it not highly culpable negligence, after said parties went into possession of the mine and began their labor and expenditure, under his eyes, he having full knowledge of their contract with Taliaferro in the bond and lease, to still fail to look into the case to see if it had been regular?

Dye's statements to Heiniman and Crary and others were direct and positive;—did not say he had not examined the papers, and therefore did not know, but said clearly and positively that he had lost his interest, or it had been taken for debt, that his time to contest this suit had lapsed, and various other unqualified expressions; "he assumed to know" in all his talk.

> "A party's ignorance of the representation made by him will not, however, remove the estoppel, if he was in reason bound to know the fact, or if he wilfully shut his eyes to the fact, or turned away suspecting that otherwise facts would be disclosed at variance with those represented to exist, or if he made the representation in clear and positive terms without knowing whether it was

true or false, or if his ignorance was the result of gross negligence."

Bigelow on Estoppel, 530; *see also notes* 1 *and* 2.

Also:

2 *Pomeroy's Eq. Jur. Secs.* 809, 810, 811.

"Whether the party thus misrepresenting a matrical fact, knew it was false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false."

Story's Eq. Jur., Sec. 193; *also, idem, Sections* 585-587, 588.

"And the making of such a statement (in positive words, as though knowing), even in ignorance of its falsity, would have amounted to such culpable negligence as would be the equivalent of fraud."

Two Rivers Mfg. Co., vs. Day, 75 *N. W.* (*Wis.*) 440-442.

"The attempt was made by Sullivan to testify that he did not know the contents of the receivers petition, and supposed that he was called upon to answer in respect to his possession of the Badger firm, and so it is argued that he ought not to be precluded by a mistake. If, under the circumstances, he was in fact mistaken, it was the result of gross and inexcusable negligence, the consequence of which should be borne by himself, rather than by those who were lulled thereby to sleep upon their rights. (here citations). 'The rule has sometimes been stated,' says Pomeroy, 'as though it were universal, that an actual knowledge of the truth is always indispensable. It is, how-

ever, subject to so many restrictions and limitations as to lose its character of universality. It applies in its full force only in cases where the conduct creating the estoppel consists of silence or acquiescence. It does not apply where the party, although ignorant or mistaken as to the real facts, was in such a position that he ought to have known them, so that knowledge would be imported to him. In such case, ignorance or mistake will not prevent an estoppel. Nor does the rule apply to a party who has not simply acquiesced, but who has actively interferred, by acts or words, and whose affirmative conduct has thus misled another. Finally, the rule does not apply, even in cases of mere acquiescence, when the ignorance of the real facts was occasioned by culpable negligence. 2 Pom, Eq. Jur., sec. 809."

Sullivan vs. Colby, 71 *Fed. Rep.*, 460-5.

Also:

Chase's Appeal, with many citations of authorities, 18 *Atl.* 96 (*Conn.*).

The same ready means of information which Dye availed himself of when he wrote to his attorney, after the mine became rich, for an opinion as to the validity of the sale of the mine, he also admittedly had all the time from the day of his return on April 22, 1899, and acquired knowledge of all the facts touching such sale, until he actually resorted to such means of knowledge.

A party to a suit is bound to know whether a judgment against him in the same suit is regular or not.

Payment vs. Church, 38 *Mich.*, 776.

Dezell vs. Odell, 3 *Hill* (*N. Y.*) 215.

Delaplaine vs. Hitchcock, 6 *Hill*, 14.

The intent to defraud by representation is immaterial.

Patterson vs. Hitchcock, 5 *Morrison's Mining Reports,* 543.

The attachment case, Taliaferro vs. Dye, collaterally attacked here, was still an open one as to Dye when he returned in April, 1899, and learned of all that had taken place in his absence. The judgment in said attachment case had been rendered on December 31st, 1898; and under our statute he had one year, or more than eight months after his return and the acquiring of full knowledge, to move to set aside said judgment for irregularities. Compiled Laws,(1897, Sec. 2685, sub.-sec. 137. He also had about ten months, under our statuee after his said return and his full knowledge of all the facts, to redeem the Compromise mine by reimbursing Taliaferro, the purchaser at such sale.

Compiled Laws (New Mexico) 1897, *Sec.* 3126.

Kirk vs. Hamilton, 102 U. S. 68, is squarely in point to estop Dye because of his asquiescence in what had been done in his absence, his election to abide by said sale, by which his debt to Taliaferro had been paid, and his conduct in standing by without action or protest, while Taliaferro held possession of said mine for more than a year,—and especially in standing by, with full knowledge of the facts, while Heiniman and Crary, under contract with Taliaferro as owner, carried on the successful mining operations, under his (Dye's) eyes, and with every encouragement from him.

> "Undoubtedly he then knew, he must be conclusively presumed to have known, after

he appeared before the auditor, all that had taken place in that suit during his absence from the District, including the sale of the premises in dispute, which took place only a few months before his appearance before the auditor. If that sale was a nullity, the court, upon application by Kirk, after his appearance before the auditor, could have disregarded all that had been done in it subsequently to the first sale, discharged Hamilton's bond, returned the money he had paid, and, in addition, placed Kirk in the actual possession of the property. No such application was made. No such claim was asserted. No effort was made by him to prevent the execution of a deed to the purchaser at the second sale. So far as the record shows, he seemed to have acquiesced in what had been done in his absence. * * * Three years after his return to the city, * * * he became aware that Hamilton was in actual possession of the premises, claiming and improving them as his property. He personally knew of Hamilton's expenditures of money in their improvement, and remained silent as to any claim of his own. * * * Hamilton was in possession under an apparent title acquired, as we must assume from the record, in entire good faith, by what he supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction. * * * It is clear * * * that the plaintiff is estopped from disturbing the possession of the defendants. He knew, as we have seen, that the defendants claimed the property under a sale made in an equity suit to which he was an original party. The sale may have been a nullity, and it may be that he could have repudiated it as a valid transfer of his right of property. Instead of pursuing that course, he, with a knowledge of all the facts, appeared before the auditor and disputed the right of

certain creditors to be paid out of the fund which had been raised by the sale of his property. He forbore to raise any question whatever as to the validity of the sale, and by his conduct indicated his purpose not to make any issue in reference to the proceedings in the equity suit. Knowing that the defendants' claim to the premises rested upon that sale, he remained silent while the latter expended large sums in their improvement, and, in effect, disclaimed title in himself. He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true, and upon the faith of which others acted."

Kirk vs. Hamilton, 102 *U. S.*, 68.

II.

The Supreme Court of New Mexico also dwells upon the consideration that Heiniman and Crary had equal access with Dye to the record of said attachment proceedings; that they took the opinion of their attorney, R. E. Lund, as to their validity, and are therefore shown to have relied upon their own efforts and not upon Dye's conduct and representations.

Our Supreme Court bases its decision, on this ground, on an inadvertent mistake of fact. It says (R. 270 in its statement of the facts proven): "In the meantime Crary and Heiniman had expended several thousand dollars upon the claim; after making the rich discovery they obtained an abstract of title and employed an a ttorney to look the title up, including the attachment proceedings and the sheriff's sale thereunder to Taliaferro; after being assured by their attorney that the attachment proceedings were regular and

the title good, they paid Taliaferro fifteen hundred dollars under the option contract and received a quit-claim deed to the claim.'

The mistake of fact made by the court in that extract is this: that whereas the court states that Heiniman had taken the opinion of his attorney as to said attachment proceedings *after* he had received Dye's disclaimer of title, or intention not to assert any claim, the fact is just the other way, viz: Heiniman questioned Dye and heard Dye's disclaimer on Oct. 23, 1900, after he had received his lawyer's report and opinion. There is not any testimony whatever in conflict with this fact and it is established by the testimony of the attorney, R. E. Lund, and of said Heiniman.

Heiniman (R. 158, folio 244), testified on cross-examination as follows:

"Q. Are you in the habit of relying upon what people tell you, or are you in the habit of having the records examined, or examine them yourself?

A. I reply upon all three: I first go to the record, then get all the information I can from parties interested in the camp in the mining business or otherwise.

Q. Did you go to the records in this case?

A. I did, the very first thing; I had an abstract of title.

Q. Who made the abstract of title for you?

A. The county recorder, Anaya.

Q. It showed the sheriff's deed, from the sheriff to Jones Taliaferro for this property, didn't it?

A. Yes, sir.

Q. Did you have this abstract of title the first thing that you did, before you took the bond and lease?

A. No, sir; I took the bond and lease first.

Q. When did you first get your abstract of title?

A. I don't remember the date, the abstract will show for itself.

Q. It was before you paid this $1,500 wasn't it?

A. O, yes, certainly.

Q. It was before the 23rd day of October, wasn't it?

A. Yes, sir; I am positive of that.

Q. Was it before this voluntary statement of Dye (July 25th) was made to you which you have related?

A. Now, I wont be positive about that.

Q. Did you have any proceedings of the District Court examined upon which this sheriff's deed was based?

A. Yes, sir; I paid an attorney to go from White Oaks to Lincoln to examine the title to this whole thing.

Q. Who was that attorney?

A. R. E. Lund.

Q. About what time did you do this?

A. That I didn't have done until sometime in September; it was in the month of September that I had this done; it was after we made the strike of rich ore that I employed this attorney to go down."

Further down, on the same page he was asked this question:

"Q. Now, when you came to handling the property, and making this payment, did you rely upon Dye's statement to you, or the opinion of your attorney and this abstract?"

To this important question, the Supreme Court, in its opinion (R. 277), quotes of the full answer only these words:

"A. I relied upon all three."

While the whole answer (and it ought all to be construed together) is as follows (R. 159, folio 246):

"A. I relied upon all three. But his visiting the mine every day, it aroused a curiosity in me to know what he was coming there so often before (for?); while I felt that it was nothing but friendship, still I wanted to be safe, and that is why I asked him the question; I always want to keep out of trouble if I can."

We feel certain that this answer, taken all together can only mean that Heiniman, being disturbed by Dye's extraordinary interest in their strike of rich ore, in order to be safe in consummating his purchase, resolved to ask Dye again about his possible claim; and did, on October 23rd, after having exhausted every other possible means of finding out any defect in the title, after prefacing his question by stating to Dye that he was ready to make payment of the purchase price, asked Dye the pointed question whether he (Dye) knew of any reason why he (Heiniman) would not get a good title; and Dye replied, in positive, unqualified terms, to the effect of disclaiming all title in himself. And the whole context, and all the circumstances show that Heiniman relied upon Dye's disclaimer in consummating his option contract. Dye in his answer, at that juncture, promised to make no future claim.

> "The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. * * * They

(representations) would have that effect, if a party who, by his statements as to matters of fact, *or as to his intended abandonment* of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights *against his declared intention of abandonment.*"

Insurance Co. vs. Mowry, 96 *U. S.* 547-8.

"In Harkness vs. Toulmin (25 Mich. 80) and Truesdale vs. Ward (24 Mich. 117) this principle was applied, in the former case, to the extent of destroying a chattel mortgage, and in the latter of forfeiting rights under a land contract, *where parties were led to believe they were abondoned.* There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims *which he has induced others to suppose he would not rely on.*"

Dickerson vs. Colgrove, 102 *U. S.*, 578, 581.

Both of these cases last cited go upon the assumption that both parties either actually knew, or were conclusively presumed to have known, of the existing right abandoned.

Heiniman and Crary used all diligence in their anxious endeavor to get a good title, and one free from future litigation; Dye's course was obnoxious to the law from every standpoint.

DYE'S ABANDONMENT.

1. Dye failed to do the annual assessment, or pay his share of the same, for 1898.

2. He did not do, nor offer to do, nor ask Taliaferro who was in possession of the claim, for permission to do, such assessment for 1899, though he was

in White Oaks all of said year from his return in April, 1899; nor did he offer to pay his co-tenant, owner of the other one-sixth interest therein, his share of the assessment for 1898, though he would not have been precluded from saving the forfeiture by paying his co-tenant his share under the advertisement until July 15th, 1899.

DYE'S ACQUIESCENCE.

The above facts tend to show that Dye, after learning all the facts, on his return, of the sale, acquiesced in such sale, and elected to abide by the result of said sale, to-wit: the payment of his debt to Taliaferro by the sheriff with the proceeds of such sale.

DYE'S ELECTION.

Such election is further shown by the fact that Dye, though living in the same mining town of White Oaks continuously after his return in April, with Taliaferro, did not offer to repay Taliaferro said debt, nor to redeem the property nor move to set aside said judgment and sale, for any error or irregularity, jurisdictional or otherwise, though he had ample time for all or any of these steps. Such abandonment, acquiescence and election are shown by facts testified to by witnesses, Robertson, McIvers, DeSpain, Fuston, Thomas, Haley, Walsh, Taliaferro, as well as Heinman and Crary; and by Dye's own admissions.

DYE'S LACHES.

Such laches is shown by Dye's sleeping on his rights, with full knowledge of his rights, or, at the very least, with full knowledge of facts sufficient to

put a reasonable man on inquiry, and with means ready at hand to acquire full knowledge, by inquiry, for nearly two years after his return to White Oaks in April, 1899, until this suit was filed, Dec. 28th, 1900.

> "Indeed, in some cases, the diligenec required is measured by months rather than by years. Polard vs. Clayton, 1 Kay & J. 462; Atwood vs. Small, 6 Clark & F. 356. And in others a delay of two, three and four years has been held fatal. Twin Lick Oil Co. vs. Marbury, 91 N. S., 587 (citing also many others cases). * * * There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no salable value may in a month become worth its millions. Years may be spent in working such property, apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."
>
> *Patterson vs. Hewitt*, 195 *U. S.* 309.

DYE'S ACQUIESCENCE AND ABANDONMENT

An undivided interest in a mining claim may be abandoned.

Black vs. Elkhorn Min. Co., 163 *U. S.* 445.

Dye's acquiescense in said sald sale amounted to abandonment. Idem; also,

Golden Trierra Min. Co. vs. Mahler, 4 *Morrison Mining Rep.* 390.

"When a party with full knowledge, or at

least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although orignally impeachable, becomes unimpeachable in equity."

2 Pomeroy's Eq. Jur. 965 (*N. Y.*).

Also:

Power vs. Larrabee, 57 *N. W.* 789.

Equitable defenses may be made under the general issue in ejectment.

Dickerson vs. Cosgrove, 100 *U. S.* 578.

DYE'S ELECTION; RECEIVING THE BENEFITS.

2 Smith's Leading Cases, 770, *as follows*:

"It will make no difference in the application of this principle, whether the proceeding under which the sale occurs are voidable or wholly void, in consequence of the want of jurisdiction, or an irregularity in its exercise:: Spragg vs. Shriver, 1 Casey, 282, 287; Merritt vs. Horn, 5 Ohio, N. S., 307. And as the estoppel is designed to prevent this injustice that would arise, if a man could derive all the benefit from an act that it is capable of conferring, and then set it aside to the injury of third persons, a defendant in an execution may be precluded from question

the validity of the writ of judgment by allowing the purchaser to make payments to the sheriff which will go in satisfaction of the judgment debt: Crowel vs. Meconkey, 5 Barr; 176; Mitchell vs: Freedley, 10 id. 208; Spragg vs. Shriver, 1 Casey, 282, 287. 'A defendant,' said Lewis, J., in Spragg vs. Shriver, 'who has notice that his property is about to be sold by the officers of the law for the payment of his debts, and makes no objection until an innocent purchaser has paid the purchase money, and received a deed duly acknowledged, is estopped from objecting afterwards.'"

2 Smith's Leading Cases, 770.

See also:

Maple vs. Kussart, 91 *Am. Dec.* 214.

Spragg vs. Shriver, 64 *Am. Dec.*, 698.

Parties and privies are estopped:

Bigelow on Estoppel, pp. 517-519.

Idem, pp. 94 *et seq.*

Ratcliff vs. Belfont & Co., 10 *S. W.*, 365.

Dickerson vs. Colgrove, 100 *U. S.*, 578.

10 "*Cyc.*" 777 (*note* 29), 779 (*note* 35).

2 Pom. Eq. Jur., Sec. 813.

5. Ignorance of facts and ignorance of law distinguished. Ignorance of law does not excuse.

Black vs. Sammons, 62 Pac. Rep., 290 *and cases cited.*

Robbins vs. Moore, 21 *N. E.*, 934.

Storrs vs. Barker, 10 *Am. Dec.*, 316 (*n*); *also in 6 Johns. Ch.*

6. Holding under quit claim deed does not preclude

purchaser from being held "bona fide" purchaser.

Moelle vs. Sherwood, 1448 *U. S.*, 21; *also* 13 *Sup. Ct. Rep.*, 426.

7. When one of two innocent persons must suffer, he whose negligence caused the loss must bear the consequences.

McConnell vs. Redmond, 37 *S. E.*, 586 (*cases cited*).

Titus vs. Moore, 63 *Am. Dec.* 665.

8. Taking advice of an attorney by party claiming the estoppel does not show he did not rely on representations, especially if representations made afterwards.

Robbins vs. Moore, 21 *N. E.*, 934.

After Taliaferro purchased said property at sheriff's sale, and before the forfeiture occurred under the advertisement against Dye by his co-tenant, Taliaferro paid to said co-owner, or his agent, the amount claimed against Dye by such co-tenant for not doing his (Dye's) share of the assessment work for 1898, Taliaferro, to protect his said purchase, paid said amount, and thus prevented said forfeiture from becoming effective as to himself (Taliaferro). This Taliaferro was permitted to do under a statute of the Territory of New Mexico; and by the same statute Dye's interest was thereby ended.

Compiled Laws (New Mex.) 1897, Sec. 3126. The Supreme Court of the Territory, in its statement of facts found by it (R. 270) found the facts upon which this point is based.

It is, therefore, respectfully submitted that the opin-

ions and decisions of the Supreme Court of the Territory of New Mexico in this case should be reversed, and that such further order should be entered herein as to this court may seem meet and proper.

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Office Supreme Court, U. S.
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No. 103

IN THE

Supreme Court of the United States

OCTOBER, 1907, TERM.

H. C. CRARY, ET AL.,
Plaintiffs in Error,

vs. No. 103.

BENJAMIN H. DYE, ET AL.,
Defendants in Error.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

REPLY AND SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR

H. B. FERGUSSON,
Attorney for Plaintiffs in Error.

MORNING JOURNAL, ALBUQUERQUE, N. M.

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I.

THE NOTICE BY PUBLICATION.

Said notice is in accordance with the then existing attachment law of New Mexico, and was sufficient, even had it been attacked by a direct proceeding.

Counsel for defendants in error is mistaken in saying said notice was served in accordance with sections 2701, 2955 and 2956. The said attachment suit of Taliaferro vs. Dye was commenced in March, 1898, under the practice act, or code, enacted in the legislative session of 1897, and appearing in the Compiled Laws of 1897, as section 2685, Sub-section 24 of said section 2685, enacted long subsequent to said sections 2701, 2955, and 2956, provides for the publication no-

tice in suits by attachment, and the publication notice in said attachment suit of Taliaferro vs. Dye, collaterally attacked here, is in strict accordance with said sub-section 28, as well as with the other statutory requirements as to length of time of publication, etc.

All doubt as to whether the legislature intended to amend the law of said section 2701 in enacting said section 2685 and sub-section 24 thereof, is removed by the terms of sub-section 175 of said section 2685, which excepts from the operation of said section 2685 attachment *writs* only (not attachment proceedings); the doctrine of *expressio minus est exclusio alterius*, clearly applying. And this view is emphasized by section 6 of chapter 75 of the Acts of the Legislative Assembly of New Mexico of 1899, which amends said sub-section 175 by excepting from the operation of said section 2685 "proceedings by attachment."

The decision of the Supreme Court of the Territory of New Mexico in Smith vs. Montoya, 3 N. M., relied upon the counsel for defendants in error, was a decision construing our attachment statute relating to notice by publication as it existed prior to the enactment of said section 2685. And the Missouri cases relied on by counsel for defendants in error are not applicable here, as they relate to a Missouri statute from which our superseded section 2701 was taken, according to counsel's statement.

But the case at bar is a collateral attack; while the case of Smith vs. Montoya is a direct attack, as appears by the case itself. The court in that case, page 20, says: "As no judgment could be legally rendered

against Smith as garnishee until after judgment had been rendered against the defendants in the action in which he was summoned as garnishee, it follows that the garnishee had the right, as a matter of defense, to show, either by the record, or, if the record was silent, by other competent proofs, that the judgment was void for want of jurisdiction. But in a collateral attack want of jurisdiction is not allowed to be shown "by other competent proofs," or otherwise than by an inspection of the record back of the judgment collaterally attacked.

And as if to remove all ground from the defendants in error to contend that that decision in Smith vs. Montoya was in a case of collateral attack, the court, in the last clause of said opinion reverses the judgment in the lower court and remands the case with instructions to proceed to a proper judgment against the principal defendants and then give the garnishee, Smith, a new trial.

The very essence of a collateral attack on a judgment is that the court in which such attack is made has no power to correct, and no control over, such judgment; while "To constitute a direct attack upon a judgment, it is said, it is necessary that a proceeding be instituted for that very purpose."

1 *Black on Judgment, Sec.* 252.

And Smith, in the case under discussion, took his appeal for the very purpose of reversing that judgment.

II.

The Necessity for the Alias Writ,—which is a mat-

ter within the discretion of the trial court. Defendants (Plaintiffs in error here) offered to show, on the trial of this case, that after the return of the first writ in the attachment case herein collaterally attacked (Taliaferro vs. Dye), plaintiff Taliafferro discovered that the firm of Zeigler Bros. had attached previously the same lots and land, and as Taliaferro's atachment lien on said lots and land was second to that of Ziegler Bros., and therefore unavailing, he sued out the alias writ under attack herein. So defendants offered in evidence the record of the attachment suit of Zeigler Bros., which was in the same court and before the same judge, and adjudged about the same time, as tending to show that when said court adjudged said alias writ to be a lawful writ, he knew that Taliaferro's first writ had been fruitless. This record of Zeigler Bros'. suit, as offered by defendants below is marked Defendants' Ex. 7, and is found in the Record herein, pages 143 to 152 inclusive. It was excluded by the court, on objection, and exception duly taken. But we submit that, even with Ex. 7 excluded, the doctrine of presumptions indulged in favor of a judgment and sale on collateral attack (fully discussed in plaintiff-in-error's first brief), established that the court, in ordering the sale of the property attached under said alias writ, and anything of said Zeigler Bros'. suit before it, and anything else necessary to make said order and sale valid.

DYE'S ABANDONMENT.

Dye, then owning five-sixth of the Compromise mine (in litigation herein), did no part of the annual

assessment on said mine for the year 1898. Said five-sixths' interest was purchased by Taliaferro at sheriff's sale in February, 1899, while the publication was running in the local paper, signed by his co-owner Johns advertising Dye out for such failure to contribute in labor or money to the assessment for 1898. Had Taliaferro, after his said purchase, permitted said publication to run for three months, and three months additional to elapse without paying off Dye's debt to his co-owner, viz: five-sixths of one hundred dollars,—had he permitted this inchoate, or accruing title to Dye's said interest to become perfect in Dye's co-owner, he (Taliaferro) would have lost what he purchased at said sheriff's sale. Section 3126, Compiled Laws (1897) of New Mexico, afforded him the only chance to save said purchase and the original debt for which he sued. He, therefore, paid to the agent of Dye's co-owner the sum due from Dye for assessment for the year 1898, and under said section 3126, he has the right to the property as against any claim of title by Dye. While analogous to it, it is not the equitable doctrine of subrogation. It is a statutory right that Taliaferro claims. But counsel for defendants in error, as if distrusting his ground, says that in this suit at law Taliaferro cannot avail himself of the equitable doctrine of subrogation as a matter of practice. He is answered by the case of Dickerson vs. Colgrove, 100 U. S. 578. Besides our statute of ejectment permits a defendant to prove, under the plea of not guilty, anything tending to show that the plaintiff is not entitled to recover. Compiled Laws 1897, section 3165.

It should be borne in mind, on this point, that Dye was in White Oaks, while said publication for non-payment of assessment was running in the White Oaks newspaper, from April, 1899, and had constructive, if not actual, notice of the approaching loss of his title in said mine to his co-owner, by virtue of such publication under Federal law; and that he, by non-interference, acquiesced therein and in Taliaferro's action in paying said assessment and preventing the forfeiture for his (Taliaferro's) own benefit under said section 3126.

Dye does not testify that Johns did not make demand of him for payment of said assessment before the commencement of said publication of forfeiture; and Dye's presence in White Oaks and actual knowledge of said publication and making no objection is a tacit admission that such publication was rightly made. And it is testified by two disinterested witnesses that Dye admitted, in the summer of 1900, that he (Dye) had lost his interest in the Compromise mine because of his failure to do his assessment work.

John H. Robertson so testifies; R. 126, folio 193.
Mark Thomas so testifies; R. 143, folio 221.

While witness Walsh testified, as quoted on page 24 of brief for defendants in error, yet he also testified that Johns was manager of the Apex Co. Said witness does not testify that the Apex Co. owned the Compromise mine, only that Johns, its manager, was having such work done by Walsh. Nor does he testify that Johns was not an owner of an interest in the Compromise. But Johns describes himself in said

publication notice as co-owner with Dye during the year (1898). The evidence is positive in said publication notice (R. page 201) as to Johns' ownership; while the testimony of Walsh, above referred to, upon which alone counsel relies to prove that Johns was not a co-owner with Dye, does not even bear the construction that Walsh necessarily meant to assert that the Apex Co. was a co-owner in the mine; and Walsh's said statement certainly does not bear the construction that Walsh testified that Johns was not the co-owner, as he asserted he was in said publication of forfeiture on page 201. The real estate records of the county were open to counsel to prove that Johns was not such co-owner as he described himself to be if such was not the fact; but counsel relies solely on the statement of the miner Walsh, quoted in counsel's brief. And on this slender foundation counsel proclaims that the case of Turner vs. Sawyer, 150 U. S., settles this case in his favor in holding that only a co-owner can take advantage of the forfeiture provided against a co-owner for failure to perform his share of the annual assessment. The evidence contained in the recital in Johns' publication on page 201, that Johns was co-owner with Dye, is *prima facie* proof of the fact. Counsel has not produced any evidence whatsoever, to the contrary, the best evidence being open to him in the recorded deeds of the county. So the case of Turner vs. Sawyer has no application here.

* * * *

Counsel for defendants in error, at page 30 of his

brief, says: "The writ of error is not sued out to both decisions of the Supreme Court of the Territory, but only to the second."

But after reversing the lower court, and deciding that such collateral could be made, because said judgment and sale, in its opinion, were void, the Territorial Supreme Court remanded the case to the District Court for a new trial. Upon such new trial, the District Court held itself bound by the Supreme Court's decision on the question of collateral attack, and refused to consider that question again; but instructed the jury to find against these plaintiffs in error on the question of estoppel, and entered final judgment against these plaintiffs in error upon the whole case. Upon the taking of the case again to the Supreme Court of the Territory, that tribunal affirmed the judgment and decision of the District Court, and entered final judgment against the defendants, who are plaintiffs in error here. This last decision of the Territorial Supreme Court necessarily made final, and made final for the first time, by refusing to consider or change it, its first decision on the question of the collateral attack. Plaintiffs in error then sued out this writ of error, and assigned errors to the whole case in which appear both opinions of the Territorial Supreme Court. Was it necessary to sue out two writs of error, when one necessarily brings up the whole case?

* * * *

Counsel makes criticisms of various parts of said attachment proceedings, such as the sheriff's notice of

sale and sheriff's deed; but none of these go to the jurisdiction of the court, and at most are irregularities that cannot be availed of on collateral attack. This court has held that a defective service by publication is not a jurisdictional defect, such as can be reached on a collateral attack.

Cooper vs. Reynolds, 10 *Wall.* 308;
Mohr vs. Manicre, 101 *U. S.* 417;

Other authorities, likewise in point:

Paine vs. Moreland, 15 *Ohio*, 445;
Cochran vs. Loring, 17 *Ohio*, 432;
Enc. of Pl. & Pr., Vol. 17, *Sec.* 120 *and citations in notes.*

It will be found upon inspection of the authorities discussed by counsel for defendants in error in his brief at pages 37 to 47 inclusive, that they relate to Probate Courts or other inferior tribunals; or, in the case of superior courts, they relate to the exercise of powers specially conferred by statutes for a special purpose; or they relate to cases where the want of jurisdiction affirmatively appeared — and conclusively—in the record itself, as the case of Galpin vs. Page, 18 Wall. 350; or they relate to cases where construction service was attempted to be substituted for personal service, where a decree in personam was sought. And many cases there cited by counsel are cases of direct attack, which are not in point here, because many errors and irregularities that would be held to render the proceedings void (loosely using the

word) in a direct attack would not be held fatal in a collateral proceeding.

ESTOPPEL.

In addition to the findings of fact stated by the Supreme Court in its decision of the question of estoppel, plaintiffs in error requested said Supreme Court of the Territory to find certain additional facts, which were either uncontradicted or admitted by Dye to be facts. Such request and such additional facts appear in the Record, pages 261-2. The Court (R. 267) overruled such request, and refused to find such additional facts because, as it ruled, to do so was unnecessary. To this action the plaintiffs in error duly excepted; and error is assigned in the assignment of errors (R. 263) to the refusal of the court as to each fact specified. These facts in substancefi with reference under each to the testimony in the Record, are as follows:

1. That Witness Fuston communicated to Heinman & Crary Dye's disclaimer of title in the Compromise mine in August, 1900, see R. 139, 141-2.

2. That Heinman & Crary had the title to the mine examined by Attorney Lund in September, 1900, long before Dye made disclaimer to them when they, Oct. 23, stated to him that they (Heinman & Crary) were about to make final payment for the property, and asked him if he knew any reason why they would not get a good title to the property.

See—

Lund's testimony, R. 178.
Heinman, R. 150, 158, 159.
Crary, R. 168.

3. That the last disclaimer of Dye of any title to said property occurred on Oct. 23, 1900, *after* such examination and report by Attorney Lund.

See—

Testimony of Heinman and Crary on pages last referred to.

Dye does not deny this date.

4. That Heinman and Crary said that they relied upon the assurances of Dye that he had no interest, and would not have purchased the property but for the representations and conduct of Dye.

Heinman, R. 153, 150, folio 232.

Crary, R. 168 (last answer on p. 168), folio 259 and folio 260.

5. That Dye began to question in his own mind the regularity, and possible void character of the sale under, said attachment proceedings about the first of October, 1900.

Dye's cross-examination, R. pp. 213, 214, 215, 216.

Jones Taliaferro, R. 182, folio 281.

6. Dye had so successfully concealed from Heinman and Crary his mental movements in questioning said attachment suit and his arrangements with his lawyer for attacking the validity of said attachment sale, that Heinman and Crary continued their development of said Compromise mine without any intimation of what was going on against them at Dye's

hands, until Jan. 17th, 1901, when summons in this suit was served upon them.

Heinman, R. 151 (last question on page 151 and two answers on page 152).

Crary, R. 252, folio 392.

Sheriff's return of service, R. 31, folio 48.

7. That Dye visited the scene of Heinman & Crary's devolepment workings, after his disclaimer of title or claim on Oct. 23, also after final payment by Heiniman and Crary on Nov. 1st for the property; also while he was questioning in his own mind, and consulting his attorney about, the validity of said attachment suit and sale, and also after he had ordered suit brought on Dec. 4th, 1900, just the same as he had done from the date of the rich discovery.

Heinman, R. 152, folio 234.

8. Dye had actual knowledge of all the facts touching the option of Heinman and Crary, of their entry under it upon development work in June, 1900; of the development work as it progressed, of the rich discovery on Aug. 25th, and of the time of the expiration of said option.

Established by the testimony of Heinman and Crary, which was not contradicted by Dye, and by Dye's own admissions on cross-examination.

9. That Dye was, and had long been, a practicing lawyer in New Mexico is admitted.

These facts in connection with other facts tend to prove that Dye practiced deliberate deception of, and was guilty of intentional and fraudulent concealment

from Heinman and Crary while they were devoting their labor and means to the development of the mine, which he expected to recover, apparently with the design of getting said mine developed as much as possible before Heinman and Crary became aware of his intention to assert his claim.

With the facts of this case fully set forth, as we have tried to do, counsel for defendants in error finds his chief reliance in the case of Brant vs. Virginia Coal & Iron Co., et al., 93 U. S. 326. But the facts in said case show that it has no possible application to the case at bar. The court in said Brant case says in its opinion on page 335: "There is no evidence that either the complainant or Hector Sinclair (the parties sought to be estopped) ever made any representations to the defendant corporation to induce it to buy the property from the purchaser at the sale, or that they made any representations to any one, respecting the title, inconsistent with the fact."

The case at bar, as to the facts, is more like the case of Dickerson vs. Colgrove, 100 U. S. 578, in which the parties had equal access to, and means of knowledge of, the defect in the title. Yet the estoppel was enforced because the party estopped had disclaimed his intention to in future assert his right; and the party claiming the estoppel had learned of such disclaimer before making his expenditures and executing deeds to the property in question.

If Heinman and Crary, after diligent but fruitless efforts to ascertain the facts as to the title, are to be presumed to have known the truth, surely Dye, a party to that suit, with motive for inquiry as to the

title under that suit, will also be presumed to have known all the facts as to the title. If both parties herein are presumed to have so known, then the said case of Dickerson vs. Colgrove is exactly in point.

Another case, very persuasively, if not decisively in point here is Kirk vs. Hamilton, 102 U. S. 68; except in this case Kirk was estopped because of his conduct and silence when he should have spoken; he was found to have disclaimed title by his conduct and silence alone, without any statement whatever; while Dye, in this case, though guilty of almost the same conduct and silence, when he should have spoken, made also positive statements, disclaiming title, to others and to Heinman and Crary direct (on Oct. 23). During his absence, Kirk's property was sold under judiccial process. Upon his return, he found the purchaser in possession of the property so purchased; and for months Kirk lived near by, while the purchaser, within Kirk's knowledge, made large expenditures of money on improvements placed on said property, while claiming it as his own, in reliance, as the court says, upon "what he supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction." On Kirk's return, the court had referred his case to an auditor to pass upon certain claims that had been presented for payment out of the fund arising from the sale of Kirk's land. Kirk appeared before the auditor and disputed some of the claims. From this circumstance the court finds that Kirk had knowledge after such appearance, of the sale of his property during his absence, and that he was conclusively presumed to have

known, during said conduct and silence, all that inquiry would have disclosed as to the claim of error in said sale, on which he brought said suit of Kirk vs. Hamilton. And because of said conduct and silence, while the purchaser was improving said property, he then having knowledge all the while of his own claim, the court conclusively presuming that he had such knowledge from the fact that he had every means of knowledge, in knowing that his property had been sold by judicial process, in the suit in which he appeared before the auditor. So this court held Kirk estopped, even if the sale of his property was invalid. In the case at bar, Dye admits openly that he learned immediately upon his return that his property had been sold during his absence under attachment proceedings brought by his creditor, Taliaferro; that the latter as purchaser under judicial sale was in possession. Having such knowledge, did he not, like Kirk, have the means of knowledge, viz: an inspection of the papers in such attachment suit—that said sale was invalid, if it was invalid?

"Hamilton" (like Heinman and Crary) "was in possession under an apparent title acquired, as we must assume from the record, in entire good faith, by what he supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction."

Kirk vs. Hamilton, 102 *U. S.* 68.

Dye must prove, in order to escape from his *Positive Representation and Disclaimer*, that Heinman and Crary had actual knowledge of the falsity of Dye's

representation, before they paid the purchase price on Nov. 1.

2 Pomeroy's Eq. Jur., Sec. 895 and note 1.

Long *before* Dye's said positive disclaimer, to-wit, in September, Heinman and Crary had Attorney Lund examine said attachment proceedings, and received his report and opinion that such judicial sale was regular and valid. It is certain that they had no knowledge of any defect therein, as to alias writ or otherwise. After that report and opinion, on October 23, becoming disturbed, meantime, by Dye's extraordinary interest in the increasing richness of the mine, and dreading the possibility of a law suit at Dye's hands, they asked him again about the title thereto which they were about to purchase, and received his positive disclaimer of any title or any intention, in the future, to assert any title or claim thereto, and Dye's actual fraud in such answer and disclaimer seems to be proven, as he had then, for nearly a month, by his own admission, been considering whether he might not find a defect in said attachment proceedings.

Respectfully submitted,

H. B. FERGUSSON,

Attorney for Plaintiffs in Error.

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No. 103.

Supreme Court of the United States

OCTOBER TERM, 1907.

H. C. CRARY, *et al.*,
Plaintiffs in Error,
vs.
BENJAMIN H. DYE AND WILLIAM B. CHILDERS,
Defendants in Error.
} No. 103

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR DEFENDANTS IN ERROR.

W. B. CHILDERS,
Attorney for Defendants in Error.

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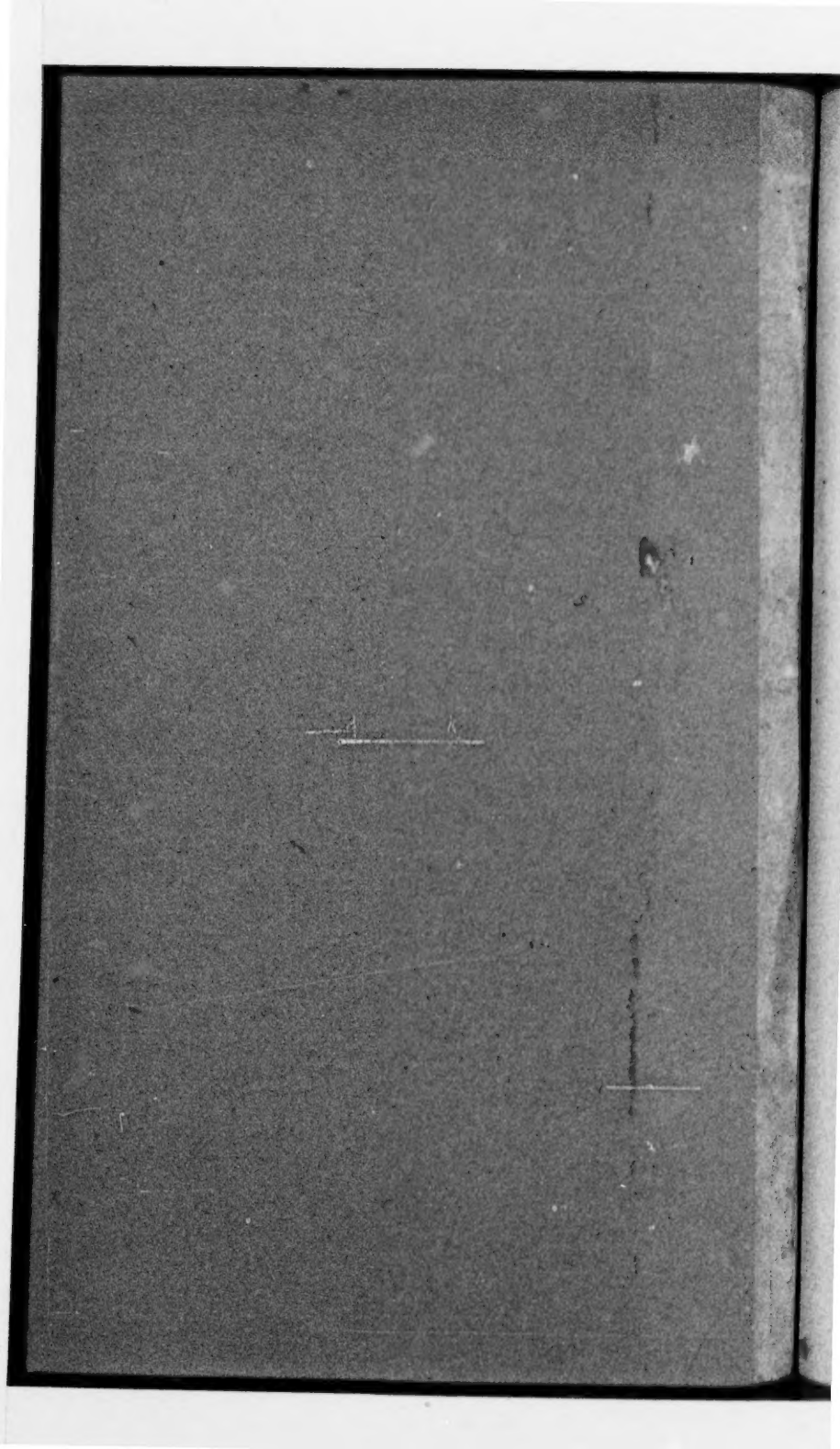

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W. B. CHILDERS,
Attorney for Defendants in Error.

STATEMENT OF THE CASE.

This is a suit in ejectment to recover an undivided five-sixths interest in the Compromise Mine, located at White Oaks, Lincoln County, New Mexico. The mine was located on April 21, 1887, in the name of B. H. Dye, John D. Cockrell and T. W. Heman: *"Plaintiff's Exhibit A," record, page* 70. On May 24, 1890, Heman conveyed one-sixth interest to G. B. Barber, *'Exhibit B, record, page* 71. On January

24, 1896, Barber's interest was forfeited under the provisions of Section 2324 R. S. U. S. *"Exhibit C," page* 73. Cockrell's interest had been forfeited in the same way in 1891, for failure to do the work in 1890. *"Exhibit D," page* 74. In this way Dye became the owner of five-sixths of the mine. Dye conveyed half his interest to Childers, *Record, page* 66.

On March 3, 1898, the defendant Jones Taliaferro commenced attachment proceedings in the district court against Dye, to collect two promissory notes, one for $80.00, dated February 1, 1895, and one for $32.47, dated January 1, 1897, with interest on the same at 12 per cent per annum, and attorney's fees for collection. The attachment proceedings pleadings are marked *"Plaintiff's Exhibits G, H, I, J, K, L, M, N, and P,"* including the writ of venditioni exponas and the sheriff's deed; *Record, pages* 76 *to* 89. The attachment affidavit alleges, upon information and belief, that the defendant Dye "has been at some place in the state of Ohio, his present place of residence, and whereabouts being unknown to plaintiff, that service of process herein cannot be had upon Benjamin H. Dye in the ordinary way, nor in any way except by publication." *Record, page* 78, *Exhibit H.* The writ of attachment was issued and the sheriff returned on said writ that it was received by him on the fifteenth of March, 1898, and executed by levying upon the attaching all the right, title and interest of the defendant Dye, in and to the following property, being town lots, to-wit: "The undivided one-half of lots two (2), eight (8), and eleven (11), in Section twenty-five (25)," etc, etc., "in Lincoln County," etc. *Record, pages* 79-80.

It will be observed that this writ was not levied upon the interest of the said Dye in the Comprom-

ise, Mine, or any other property except the parcels of land described in the return.

Without any order of court being made authorizing publication, a notice of pendency of suit was published in the "White Oaks Eagle," a newspaper, the first publication being on March 17, 1898, and once a week for five consecutive weeks thereafter. The affidavit says, "the full period of thirty days, the last publication being on the 14th day of April, 1898." *See Record, page 82 for Affidavit, and page 83 for Notice of suit.*

The notice is fatally defective. It does not even notify the defendant that his property has been attached, to say nothing of describing the property attached. It simply notifies him that a suit in attachment has been commenced against him to recover the amount of indebtedness sued for. It further notified the defendant that unless he entered his appearance "on or before this the June 1898 rule day of this court, the same being the first Monday, and the 4th day of June, 1898, judgment will be rendered against him in said cause."

This process was sued out in accordance with Sections 2701, 2955 and 2956 Compiled Laws of New Mexico of 1897, hereinafter quoted. The Code of Civil Procedure, Section 2685 Compiled Laws 1897, had been enacted in 1897 before this suit was brought, but Sub-section 175 expressly provided it should not apply to attachment suits.

On the 11th day of May, 1898, no appearance having been entered, and no order of court having been obtained authorizing it, the plaintiff obtained from the clerk of the court what he called an Alias Writ of Attachment. No new affidavit was filed. No new bond was given. Judgment by default was taken, although there was no service of personal pro-

cess against the defendant upon the levy of the writ on the town lots, as above stated. *Record, pages* 84 *and* 85.

Thereupon an alias writ of attachment was issued by the clerk, without any order of the court, and returned, and a venditioni exponas was issued, *Record, page* 85, reciting the judgment by default and authorizing a sale. The alias writ was issued on the 11th day of May, 1898, *Record, page* 81, and the venditioni exponas was issued on the 31st day of December, 1898, reciting a levy upon the mining claim in question in this case, and abandoning and saying nothing about the levy which had been made upon the town lots. No new notice of pendency of suit was made. The sheriff returned that he received said alias writ on the 27th day of May, 1898, and proceeded to levy upon the interests of the defendant Dye in said mine. *Record, page* 82.

After the alias writ was issued and on the 31st day of December, 1898, the court rendered a judgment by default against the defendant, without any new publication having been made and without having ordered said writ to issue, and ordered that the mine as well as the town lots be sold. *Record, page* 84. Thereafter the sheriff advertised that on February 18, 1899, he would proceed to sell the mining claim, abandoning the other property. *Record, pages* 85 *and* 86; and proceeded to have it appraised, as required by statute, appraising it at the sum of $250. *Page* 86. Thereupon he executed a sheriff's deed, reciting the judgment, the venditioni exponas and the levy upon the Compromise Mine, and that he had duly advertised the same and had it appraised; and that it was sold to Jones Taliaferro for $227.55; and immediately executed a deed therefor to him, although the defendant had a year in which to redeem

the same. On the 21st day of December, 1900, the said sheriff executed another sheriff's deed, *See Record, page* 89, reciting the advertisement and sale of the property. This fully completes the action of the sheriff in selling the property.

It is insisted by the defendants in error in this case that the notice of publication was altogether insufficient; that there was no authority under the laws of New Mexico for the issuance of an alias writ of attachment, and that it was not authorized by the court or justified by the statutes in New Mexico, and that therefore the same was void.

It further appears from the record that the representative work, or one hundred dollars worth of work was performed on said claim in 1898 by the Apex Mining Company at the instance of the defendant Dye. It is also insisted that that question cannot be raised in this case by the plaintiffs in error, as they entered into possession of the property in privity with the plaintiff Dye and his co-plaintiff Childers.

We will not notice the errors claimed to have been committed by the court by the plaintiffs below, which were passed upon by the supreme court of New Mexico when the case was first heard there.

It is insisted by plaintiffs in error that after Taliaferro purchased at the sheriff's sale, he paid five-sixths of the amount expended for annual labor for the year 1898 to the Apex Mining Co., which the Dye interests were responsible for. No steps had been taken at the time this payment was made to forfeit the Dye interests. These facts are established by the evidence of Thos. H. Walsh, *Record, pages* 116-117 and the testimony of Dye, hereafter referred to. A portion of the testimony of Walsh was read as given upon a former trial and the defendant was cut off from reading the cross examination. There-

fore, see also *pages* 173 *to* 178, inclusive, and the exhibit, the receipt from Taliaferro for the assessment work, *page* 175. As to Dye's testimony on this subject, *see page* 235, *folio* 364.

It appears from this that the assessment work was done in 1898 by Johns, that the five-sixths interest belonging to Dye was paid for by Taliaferro and that the forfeiture was thereby waived by accepting payment. It further appears that after Taliaferro went into hostile possession of the mine, Dye attempted to do the assessment work every year but was prevented from doing so. *Record, page* 209. It is wholly immaterial whether he attempted to do any assessment work after the date Taliaferro entered into possession of the property or not, but from these references it appears distinctly that he did offer to do so.

Much is attempted to be made in the brief of plaintiff in error of the proposition that the record does not affirmatively show that a second bond and affidavit was made. By reference to the testimony of M. B. Thompson, *page* 98, John E. Griffith, *page* 99, W. M. Driscoll, *page* 103, J. E. Wharton, *page* 110, and Ruby Berry, *page* 117, all clerks or deputy clerks of the court, and including the record of the court (except the testimony of J. E. Wharton, who was the attorney in the case, and who swears positively that no new bond and affidavit were ever taken), it does affirmatively appear that no new bond and affidavit were ever filed; and there is no presumption in a case of this kind against positive facts shown on the record that there was any such bond and affidavit filed in support of the jurisdiction of the court.

The docket entries on the records of the district court in the atachment suit of Taliaferro vs. Dye, were introduced in evidence and appear in the record as *"Plaintiff's Exhibit O, page* 97.

On June 5th, 1900, Taliaferro gave a bond and lease on the five-sixths interest in the mine to the defandants Crary and Heiniman and agreeing to sell them the interest for $1500. The lease and agreement was to run for six months. *Record*, 90, *Ex.* 4.

On the first day of October, Taliaferro and wife, conveyed said interest to the said Crary and Heiniman. *Ex.* 5, *R.* 91.

While Crary and Heiniman were working under this bond and lease, it is claimed that rich ore was discovered in the mine, which was said to have been discovered some time in August; Heiniman's testimony, *folio* 228, Crary's, *folio* 386. Several witnesses testified to different statements of Dye, that he supposed his interest had been sold under atachments and that he had lost it. All this testimony was over the plaintiff's objections, and is cited more fully hereafter.

Heiniman, who was attending to the business outside of the actual working of the mine, testified that he had the proceedings of the district court upon which the sheriff's deed was based, examined by his attorney, R. E. Lund, before paying the money. This was done in September. That Lund went from White Oaks to Lincoln "to examine the title to this whole thing." That Lund reported that he had examined the title carefully, and that all proceedings of this sheriff's sale were regular, and that everything was of record, and that so far as that was concerned, I would be perfectly safe to handle the property." An abstract of title was made. Lund's testimony fully establishes the fact that he examined the abstract prepared by the county recorder and also went to Lincoln and examined the records himself, and examined the sheriff's deed. *Record, page* 178 and especially *cross-examination, page* 179.

Heiniman says he did not tell Dye he was relying upon his answers as to his title. *Pages* 158 *and* 159. He was charged with looking after this part of the business. In answer as to whether he was relying upon Dye's statement, the abstract and the opinion of his attorney, he says he relied upon all three. *Record, page* 159, *folio* 246.

Crary says that when Dye's statements to them were made, he already had an abstract of title to the property so far as the records of Lincoln County were concerned. *Page* 255. The sheriff's deed was recorded in Lincoln County. His attorney said he had not examined the records of the district court. Crary never told Dye, or heard anyone else tell him, that he was relying upon his representatjons, or anything of the kind. *Folio* 397, *page* 255. Many, if not all of the statements of Dye about the property, were never repeated to, or heard by Heiniman and Crary, until after they had paid for the property, and until after this suit was brought. Dye's version of thes. conversations is quite different. *Record,* 228-233.

As to his knowledge of the facts Dye says at the time he made the statements about his ownership, he had no knowledge whatever of the state of the record with reference to this attachment suit, and he had no information or reason to believe whatever that they were relying upon the statements as to the title. *Record,* 231-232. This is not only undenied but corroborated, as already shown by Heiniman and Crary.

Taliaferro testifies that the present owners of this five-sixths interest, are H. B. Fergusson, Paul Mayer, Charles Spence and himself, *all of them purchasing after this suit was brought and with knowledge of the suit* and no other persons are interested. Crary and Heiniman have no interest in it. *Folios* 298-299, *pages* 193-4.

ABSTRACT OF TESTIMONY ON SUBJECT OF ESTOPPEL.

On cross examination the witness McIvers testified that Dye didn't profess to know anything about the record of the property, as to how it had been sold, or anything about the attachment suit. *Trans. page* 133.

On cross examination the witness Fuston, with reference to the sheriff's sale, testified on *pages* 141-2.

Q. Now go on and give the exact language that was used by Mr. Dye on this occasion as near as you can recall it, about the debt and his interest in the claim, etc.

A. He said he once owned an interest in the claim and that Mr. Taliaferro attached the property and it was sold at sheriff's sale to satisfy the debt.

Q. That all he said about the sheriff's sale and satisfaction of the debt?

A. That is all I remember about that part of it.

Q. What else did he say on that occasion?

A. He said that he was glad that they had made a strike on the property while he had at that time had no interest in the property but it would enhance the value of his property adjoining.

Q. You say several other questions passed the exact particulars of which you do not now remember?

A. Yes, sir; in the conversations there were other things passed that I don't remember; my mind was on my work.

Q. The next conversation took place about the middle of the week following?

A. It was about a week afterwards.

Q. You said it was about the same thing?

A. Virtually about the same on the same subject and string.

Q. Who was present when these conversations took place?

A. That would be a kind of a hard question, there was somebody there off and on about all the time.

Q. Neither Heiniman or Crary were there at the date of these two conversations, were they?

A. No, sir.

Q. Mr. Dye didn't tell you to repeat the conversation to Mr. Heiniman or Mr. Crary for him, did he?

A. No, sir.

Q. You were in no way his agent for the purpose of repeating to Heiniman and Crary?

A. No, sir.

Q. You say you did repeat it to Mr. Crary afterwards?

A. Yes, sir; something near what he told me. I talked with him about the matter.

Q. How soon afterwards?

A. As soon as he came home, he was away at the time, a day or two any way after he came home. He was talking to me about the property, about the strike, how I struck it, and how it showed up.

Q. State what you said to Crary about these two conversations with Dye?

A. As far as I can remember it was about the same conversation that Mr. Dye and I had about the matter, I told him what I showed Mr. Dye in the tunnel concerning the streak of ore and vein there.

Q. What did you say to him about the sheriff's sale and the attachment and the debt to Taliaferro?

A. Something near the same conversation that Mr. Dye and I had; there was quite an excitement at

the time over the property and Mr. Crary asked me questions who had been there, who I showed the streak to, and all about it, questions that would naturally arise concerning the property, the ore and so on.

Q. Did he express any satisfaction over what Dye had said about the sheriff's deed and the attachment?

A. No, sir; he did not.

Q. What I want you to do is to repeat as near as you can what you told Mr. Crary about the attachment and the sheriff's deed?

A. In substance just the same as I talked with Mr. Dye and he to me concerning the matter, of course in two conversations couldn't repeat the same words verbatim, but as near as I can remember just what had passed between Mr. Dye and myself.

Q. You can't give the substance any more nearly than that?

A. As I told you before what passed before, that was all there was to it.

The witness Thomas is quoted from as saying that Dye stated that he lost the claim because he was away and didn't get back in time enough to do his work. As no claim is made to this property by relocation on account of failure to do the work, the conversation testified to by this witness is wholly irrelevant and immaterial, and it is not shown that it was ever communicated to Crary. The defendants claim through the plaintiff's title.

The testimony of the witness Alexander is entirely immaterial for any purpose. *Record, page* 144. He does not state the conversation that took place between Heiniman and Crary and Dye. He simply states that he knew the general subject of the conversation. The other conversations to which he tes-

tified are wholly immaterial and occurred after the suit was brought, and they were not repeated, and as the suit was already brought they certainly could not tend to establish any estoppel.

The testimony of Heiniman and Crary is in substance and effect that Dye was engaged in mining operations on adjoining claims and that Dye and Heiniman and Crary rode backwards and forwards from the town of White Oaks to the mine; that they talked about mining operations there and that Heiniman and Crary had assays made in the assay office connected with the operations which were being conducted by Mr. Dye as agent or superintendent for Mr. Harrison, the assayer being the son-in-law of Mr. Dye, and that Dye knew they were developing the claim.

The conversation with Dye referred to, as testified by Heiniman, is on *page* 150, which we quote:

A. Yes, there was on or about the 23rd of October. Mr. Dye visited the mine, and while there in the presence of Mr. Alexander, Mr. Crary, I told him that I was about to make the payment for the property in full, and I asked him if he knew of any conflicting claim or any other claims on the Compromise. He immediately answered, there was. The Scranton claim on the west took off about a hundred feet, and he said as to other claims there would be nobody but myself. And he says I have allowed all my time to lapse, and I have no claim whatever. With that he wished me success, and hoped that it would prove to be a good mine. He says if it does, it is bound to benefit me, because I own an interest in the Little Nell claim just north of you, which is only 155 feet north of the Compromise shaft.

Q. What reply, if any, did you make to Dye's

statement as to the title, which you have just mentioned?

A. As I expressed my gratification, and told him that I was glad to see that we were all working in harmony in the camp, etc. Well, he says, I wish you the best. I hope you make a million out of it.

He states that he would not have made the first payment of $1500 if Dye had told him he was going to bring a suit to recover the mine; that he did not know that Dye was going to make any claim to the mine until he was served with summons in the case; that he was glad that "I was one of the owners," etc. In answer to the question, *page* 155, as to whether he made the final payment of $1500 in reliance on Dye's conduct and assurances given from time to time, he says, "I did. We were very warm friends at the time, and was up to the day I was served with the papers after this suit had been brought.

On cross examination this witness stated that he had not paid any consideration except the $1500 for the property; that he was to purchase the whole claim for $1500, that being the total amount of the purchase money; that he received a quit claim deed for it. With reference to riding backwards and forwards he says he didn't ride any oftener after the big strike was made than he did before, just about the same, as they happened to meet him on the road. *Page* 156. This witness gives the conversation between Dye and himself on cross examination, *page* 158, *folio* 244, as follows:

Q. Did you ever have more than one conversation with him on this subject, when Mr. Alexander was present?

A. No, sir.

Q. You say that the question that you asked

him was, whether he knew of any conflicting claim or any other claims on the Compromise?

A. Yes, sir; that is the question that was asked.

Q. Was that as near as you can recall the words that were used?

A. Those are the exact words that were used.

Q. He replied that the Cranton claim on the west took off about a hundred feet, and as to other claims, there would be nobody else but himself; now go on and state everything else that he said about his own claim?

A. He says that as for myself, I have allowed all the time elapse, and I have no claim whatever.

Q. Did you tell him that you were relying upon his answer as to the title?

A. I did not.

* * *

Q. Did you go to the records in this case?

A. I did, the very first thing; I had an abstract of title.

Q. Who made your abstract of title for you?

A. The county recorder, Anaya.

Q. It showed the sheriff's deed, from the sheriff, to Jones Taliaferro for this property, didn't it?

A. Yes, sir.

Q. Did you have this abstract of title the first thing that you did, before you took the bond and lease?

A. No, sir; I took the bond and lease first.

Q. When did you first get your abstract of title?

A. I don't remember the date, the abstract will show for itself.

Q. It was before you paid this $1500 wasn't it?

A. Oh, yes, certainly.

Q. It was before the 23rd day of October, wasn't it?

A. Yes, sir; I am positive of that.

Q. Was it before this voluntary statement of Dye was made to you, which you have related?

A. Now, I won't be positive about that.

Q. Did you have the proceedings of the District Court examined upon which this sheriff's deed was based?

A. Yes, sir; I paid an attorney to go from White Oaks to Lincoln to examine the title to this whole thing.

Q. Who was the attorney?

A. R. E. Lund.

A. About what time did you do this?

A. That I didn't have done until sometime in September; it was in the month of September that I had this done; it was after we made the strike of rich ore that I employed this attorney to go down.

Q. Was that before or after this voluntary statement of Dye's, which you have given?

A. That was afterwards.

Q. What report did your attorney make to you about that?

A. He told me that he examined the records carefully, and paid the clerk $4 to assist him to go through the records, and he reported to me that all proceedings of this sheriff's sale was regular and that everything was of record, and that so far as that was concerned I would be perfectly safe to handle the property.

* * *

Q. What did you say to Dye as to relying upon his statement as to his claim, if any, against the property?

A. I didn't say anything; I simply expressed

my gratification and was glad that we were all working in harmony in the camp; at that time we were, everybody.

Witness Crary says, "The first conversation I had with Mr. Dye was a few days after the ore was struck in the tunnel." *Page* 166. He gives the conversation on *page* 167, the material part of which is as follows (*Folio* 258):

"He said that he had owned the property and that he knew of this ore in the mouths of this old tunnel and had some assays out of it, but that it was not of sufficient value to warrant his working on it, especially as at that time, there was no way to treat these sulphides, even if they had been worth $50 a ton, that they had done a great deal of work there, but had failed to catch any ore of sufficient value to warrant working the claim; that he had allowed his time to expire and hoped that we would do well on it, that he made no claim to it, as he had owned the property on the other side of the gulch; and if we could get good ore there, it would make his Little Nell property more valuable. I think that is probably all the conversation that occurred at that time. I was elated over the discovery of this ore, both of us talked a good deal and both of us felt good.

He testified to the second conversation, which is referred to in the testimony of the witness Alexander. at which both Heiniman and Crary were present, *page* 168, as follows

Q. Give that conversation, as near as you can remember it, stating how it came up, if you know?

Same objection as to the last preceding question relating to conversations.

Same ruling. Exception.

A. Mr. Dye was there, and Mr. Heiniman asked him, I can hardly remember the exact words, but

in substance whether the title to this property, the Compromise mine, was all right. Mr. Dye replied that there was some drawn ground between it and the Scranton, and it on the side that would belong to the Scranton. It was an over-lap; that there could be no other claimant, unless it was him, and he had allowed his time to lapse and made no further claims to the property. He also added, I hope you o well with the property, and make lots of money out of it.

The cross examination of the witness Crary was omitted from the printed transcript in the lower court by mistake. All the evidence of both Crary and Heiniman as used on the former trial was read and admitted at this trial. The cross examination of Crary appears in the transcript here on *pages* 252 *to* 255 *inclusive*, and is as follows:

Cross examination, by Mr. Childers:

Q. You and Mr. Heiniman were partners in this lease and bond that you took from Mr. Taliaferro?

A. Yes, sir.

Q. Who attended to the business of looking after the title, and such things as that, you or Mr. Heiniman?

A. Mr. Heiniman did that part of it.

Q. You paid no attention to that?

A. Hardly any.

Q. How often did you see Mr. Dye at the mine?

A. I should say from once to twice a week.

Q. Were you there nearly all the time?

A. Most of the time—good deal of the time, nearly every day.

Q. He took a great deal of interest in the mines generally around the camp, and in the discoveries generally in that camp, did he not?

A. There have been but few discoveries made

in the camp but this one, since I have been there.

Q. But he took a great deal of interest in the development and discoveries in old claims in the camp?

A. I can speak for this one, but not for the others.

Q. When did you tell him that you were working that mine under a bond and lease from Taliaferro?

A. Within a week, after the bond was taken.

Q. You stated on your direct examination that your first conversation with Dye was within a few days after rich ore was struck in the tunnel, when was that?

A. In August.

Q What did he say to you, when you first told him that you were working the claim under a bond and lease?

A. That he hoped we would strike it rich and make money out of it; that he once owned it himself, and that he failed to find any ore on it, and that Taliaferro had taken it under an attachment.

Q. When was that conversation?

A. Either about Monday or Tuesday after the first discovery of the rich ore in the lower tunnel

Q. When was the rich ore discovered in the lower tunnel?

A. Sometime in August.

Q. He did not tell you until after you had discovered rich ore then?

A. We had been working and run this cross-cut tunnel, and up to the time that the rich ore was discovered he hadn't been over to see us at all.

Q. Up to the time the rich ore had been discovered, he had not been over to see you and you had no conversation with him?

A. No, sir.

Q. Had no conversation with you up to that time?

A. Up to that time, no.

Q. He didn't tell you this then, when you first told him that you had a bond and lease on the property?

A. The conversation I have detailed, was the first after this discovery and at the same time.

Q. You had no conversation with him about the property, or about the bond and lease, until after this discovery?

A. No, sir.

Q. You knew, nothing about Dye taking any interest in the matter, until Fuston had told you that he had been there?

A. That was the first.

Q. After this strike, you say you returned home on Friday evening, and took a man by the name of Millington up there with some timber; that was after the strike in August that Fuston had told you about?

A. Yes, sir.

Q. You had obtained the bond and lease on the 5th day of June, hadn't you?

A. On the 5th day of June.

Q. Now when he told you that it was not of sufficient value to warrant him in working it, and that he had allowed his time to expire, and when you had the balance of that conversation with him, which you have given on your direct examination, who was present?

A. That first conversation?

Q. The conversation in which Dye said those things?

A. The first conversation or the last?

Q. I refer to the conversation when you say you took Millington up there after the strike in August?

A. The conversation was on the following Monday.

Q. Who was there?

A. Mr. Dye, Mr. Crary, myself.

Q. Who else was there?

A. Nobody, not while we had our conversation. Mr. Fuston was working in the tunnel.

Q. What did you understand him to mean by allowing his time to expire?

A. His redemption or appeal.

Q. Alexander was not present then, was he?

A. No, sir.

Q. When was the conversation when Alexander was present, with reference to this first conversation?

A. Sometime in the latter part of October.

Q. How long before you paid the $1500?

A. Ten days or two weeks—a couple of weeks.

Q. Was Heiniman there?

A. He was.

Q. That was on the mine, wasn't it?

A. That was on the mine; yes sir.

Q. You heard all the conversation between Heiniman and Dye at the time, on this occasion I have just asked you, when the Scranton was mentioned.

A. I heard the most of it.

Q. What did Dye say about letting his time elapse, state his exact language?

A. I don't think I would attempt to repeat the exact language.

Q. As near as you can?

A. That is what I understood him to say.

Q. That is what you understood from what he said?

A. Yes, sir.

Q. State as near as you can, about what he said about making no further claims to the property?

A. He said that there would be no one outside of himself that could make any claim, and that he had allowed his time to elapse, his redemption. It was also spoken there, that it was taken from him by this way of attachment.

Q. Heiniman made the inquiry which called out these responses from Dye, did he?

A. He did.

Q. How do you know what purpose he had in making those inquiries?

A. He told me.

Q. When did he tell you, tell you there or somewhere else?

A. He said that when Dye came over, he was going to ask him right out.

Q. You or Heiniman had already procured an abstract of title to the property, hadn't you?

A. As far as the records of Lincoln County were concerned.

Q. And you had sent a lawyer by the name of Lund over to Socorro to examine the records of the District Court with reference to this attachment suit, hadn't you?

A. His answer was that he had not examined the records of the District Court, but only of the County Clerk's.

Q. Did you tell Dye or Heiniman tell him, that you were relying upon his representations with reference to his claim to this property, and that you would not purchase it if he made any claim to it, or anything to that effect?

A. I never told Dye anything to that effect.

D. Did you ever hear him told this at that or at any other time?

A. I never did.

Q. Do you have any reason to believe that Dye understood why you were making these inquiries of him?

A. No more than his word, that he made no claim.

Q. You never told him that you were relying upon his representations?

A. I never did.

Q. Or anything of that kind?

A. No.

Q. Are your statement, that you would not have paid the $1500, or done this development work, based upon subsequent occurrences, or what passed through your mind before you did it?

A. I never knowingly touch a property, where there is a prospect of any trouble with the title.

Q. That is to say, if you know there is going to be any trouble about it, you won't touch it?

A. If there is any prospect of trouble.

Q. What interest has Jones Taliaferro acquired in this property since you paid him the $1500 under the bond and lease?

A. I can hardly remember the exact fraction: he gets one-third of one-half of five-sixths.

Q. Is the deed of record?

A. It is.

Q. What has Charles Spence acquired in the property, since the suit was brought?

A. The same.

Q. Then you and Charles Spence and Jones Taliaferro, each claim one-third of one-half of five-sixths?

A. Yes, sir.

(Signed.) HARRY C. CRARY.

The witness Lund, *page* 178 for the defendants, testified that he was an attorney-at-law and was the attorney and counselor for Heiniman and Crary. On cross examination (179) he testified that he examined the record of the sheriff's deed, a certified copy of which was put in evidence in this case. The witness Lund, as shown from the testimony quoted from Heiniman's evidence, had an abstract of title prepared of the record, showing the sheriff's deed, and he himself had prepared the sheriff's deed, and examined the title and according to the evidence in this case, reported the title was good. With reference to this report, the answer of the witness Heiniman as to what Lund reported, is, "He reported to me that all proceedings of this sheriff's sale was regular and that everything was of record, and that so far as that was concerned, I would be perfectly safe to handle the property." (Page 159, Folio 246.)

With reference to all these conversations it becomes necessary to refer to the testimony of the plaintiff Dye. His testimony in chief begins with *page* 216 on the printed record, ending in chief on *page* 237 On *pages* 228 to 233, he gives his version of the two conversations which are stated to have been had with Heiniman and Crary. He does not deny that he may have said that he wished them well and was glad they made a strike; that he possibly may have stated to them that he had an interest in the claim and had lost it, as he supposed at the time he had the conversation it had been lost to him for he knew that the period of redemption of the claim from sale under the execution had passed, and he hadn't then made an examination or had an examination made of the record. In fact, he never did make any examination of the record, but

as he stated and his co-plaintiff Childers stated, he received a letter from Dye asking him to make an examination of the record and give him an opinion as to whether the sale was valid, and that Childers procured the papers to be sent to him by the clerk of the District Court and after making an examination of them, wrote a letter, which was dated or received the 4th of December by Dye, giving his opinion that the sale was invalid because the attachment was invalid.

Abstract of Testimony on Subject of Forfeiture.

T. C. Johns owned an undivided one-sixth of the Compromise mine. The Apex Mining Company, with which Johns was connected, did the assessment work on the mine for the year 1898. The property was sold under the attachment on the 18th day of February, 1899. The sheriff's deed was executed by the sheriff (his deputy executing it for him), on the same day. On the 21st day of December, 1900, another sheriff's deed was executed, signed by De.netrio Perea, who was sheriff when the mine was sold, but was not sheriff when he executed the deed. *Trans. pages* 86 *to* 89.

Thomas H. Walsh testified in answer to the question, "Who did the assessment work on that mine in 1898?" Answer, "I did it for; that is myself and another party for the Apex Mining Co." "Q. What relation had T. C. Johns to it? He was manager of the company." Witness further testified that Dye did not do any assessment work on it for that year and that a full hundred dollars worth of work was done on the mine. *Trans. page* 116 also *page* 174. It appears twice in the record.

Jones Taliaferro, the purchaser at the sheriff's sale, testified that after he purchased the mine in February, 1899, the agent of the Apex people and he himself were in possession of the mine, and that he did the assessment work in the claim in 1899.

Witness Walsh also testified that Taliaferro and himself as agent were in possession during the year 1899. This witness alsotestified, *page* 175:

Q. State whether or not Mr. Johns, or you for him, got back the five-sixths or the hundred dollars that was paid by Mr. Johns for the assessment work on that mine for 1898, and from whom he got it back?

A. I got back five-sixths of that money from Mr. Jones Taliaferro, under orders from the manager of the Apex Gold Mining Company. My orders was to give credit to the Apex Gold Mining Company for any claim I had against the Apex, and accept the money from Mr. Jones Taliaferro.

Q. Look at the paper handed you, and state if you recognize it?

A. Yes, sir. That is my signature.

Mr. Fergusson: I offer this in evidence. It is the receipt for the money, that he gave at the time he paid.

Same objection. Same ruling. Exception.

Defendants' Exhibit, 1 *read.*

The following receipt was then offered and admitted in evidence: (Page 175.)

June 15th, 1899.

"Received of Jones Taliaferro, eighty-three and thirty-five one-hundredths dollars, in full payment for assessment work on the 'Compromise' mining claim, situated in White Oaks Mining District, Lincoln County, N .M., for the year 1898; said payment being in full for assessment on five-sixths of said mining claim.

"T. C. JOHNS, By Thos. H. Walsh."

Q. Who was in the possession of that mine, or

did the possession of it obtained in 1899 continue during 1900?

A. Yes, sir. During 1900, and up to the present time; I am in charge of the property right now. I live on the property. (Page 176.)

He states that the assessment was done on the property in 1900 by Heiniman and Crary. *Trans. page* 176.

On cross examination witness testified that the work in 1899 was done in August. *Trans. Page* 176.

John A. Haley, a newspaper publisher, was introduced to prove the publication of a notice of forfeiture on account of the failure of Dye to pay five-sixths of the hundred dollars expended for assessment work done in 1898. He testified that the notice was published on the 5th, 12th and once a week for sixteen successive weeks, including the first and last insertion, the last being April 20. *Trans, page* 200.

The notice is as follows: Page 201:

"Notice of Forfeiture.

"To Benjamin H. Dye.

"You are hereby notified that I, the undersigned, coowner with you, have done the necessary assessment work for the year 1898 on the Compromise mine or lode, located in White Oaks Mining District, on the east slope of the Baxter Mountain, and you are hereby notified that unless you contribute your proportion of said expenditure within ninety (90) days of the end of this notice of publication, your interest therin will be forfeited and become the property of the undersigned.

"T. C. JOHNS."

To the introduction of this notice plaintiffs made the following objections. *Trans. pp* 200-201.

"Plaintiff objects to it upon the ground that it does not comply with the law with reference to forfeitures and is not the notice as provided by law and that it—the conditions in no way connect themselves with any title which could be acquired under that notice, and next it appears from the evidence that the amount of money due to T. C. Johns, to co-owner with B. H. Dye, to whom the notice is addressed, was paid before the expiration of ninety days from the date of the last publication of that notice."

"One other ground of objection; additional ground of objection, that the defendants having entered and claiming under the sheriff's deed in evidence in this case cannot prove an outstanding title to the property or set up any title hostile to the title of the plaintiff, Dye, which was conveyed by the said sheriff's deed; and also another ground of objection that the defendant Taliaferro entered in the possession of the property under the sheriff's deed while that notice was being published and long before the expiration of the date of the publication."

Plaintiff Dye testified; that he returned to the Territory and to White Oaks, after having been absent for the whole of the year 1898, about the 27th of April, 1899; that he did not do any assessment work on the claim because he found it in the adverse possession of Jones Taliaferro, claiming under the sheriff's sale. *Page* 219. He also testifies that he attempted to do assessment work in June, 1901, and was prevented from doing it by threats of violence by Heiniman. *Trans page* 220.

Dye testifies that in the summer of 1897 Johns purchased the Heman interest i nthe mine; that at the time this occurred, he, Dye, was doing the assessment work upon the Compromise mine; that Johns called on him and argued with him to take care of the Heman

interest in the matter of the assessment work for 1897, which he, Dye, did; performed the work, Johns having gone. Johns requested Dye in a day or two afterwards to make him a proposition in writing for the purchase of his, Dye's, five-sixths interest; that he, Dye, made him a written proposition, which Johns took away with him. This was in July. In August, 1897, Dye went to Colorado; met Johns in Denver, had further conference with him; Johns paid him in Denver for his portion of the assessment work done in 1897, and requested of Dye another proposition for the sale of his interests. Dye gave him another proposition in the form of a memorandum. Dye afterwards executed a deed and placed it in escrow, with Jos. Gumm at White Oaks, to be delivered within the time agreed upon and upon payment by Johns of the purchase price. Dye went to Ohio and was sick, returning to Denver in June, 1898, and then agreed that the deed should remain in escrow until Johns had full opportunity to sell this claim and others he was endeavoring to sell, and Johns agreed that as he was going to White Oaks and Dye did not know when he would go there, he, Johns, in consideration of the fact that Dye had attended to the assessment work the previous year, he, Johns, would arrange for the assessment work for 1898. Dye never saw Johns afterwards. He died in the spring of 1899. *Trans. pages* 234-5-6.

This testimony is absolutely undisputed. It is corroborated in part at least by the testimony of J. A. Haley, a witness for the defendants. *Trans. pp.* 171 The witness Haley was not certain as to whether Johns was in White Oaks and personally had the notice of forfeiture published. He says Johns died in two or three months from that time. *Trans, page* 240

Jones Taliaferro, a defendant, who resided in White Oaks, says he saw Johns in White Oaks the last

time in the fall of 1898 or 1899. He is not certain which year, 1898 or 1899. *Trans. page* 241.

Sections 2955 and 2966 of the Compiled Laws of New Mexico (1897), referred to in the above statement of the case, are as follows:

"2955. The first Monday in each month is designated as a return day for process issued from the district courts in civil actions to bring defendants into court, and each defendant must enter his appearance in the clerk's office on or before the day upon which such process is made returnable, if service has been made on him as hereinafter provided, or judgment by default or decree pro confesso may be entered against him."

"2956. Such process shall be served in the manner now provided by law, and shall be returnable on the first return day occurring not less than twenty days after service, if defendant is sued in any county within the district in which he lives, and on the first return day occurring not less than thirty days after service, if defendant is sued in any county outside of the district in which he lives. Such process may also be served by publication as provided by law in cases returnable to the regular term of the court, and such publication shall be made for four consecutive weeks, the last publication thereof being at least two weeks before the return day to which the process is returnable, and the notice shall specify said return day. All service of such process heretofore made by publication for the time and as provided in the preceding section, shall be deemed as valid as if said section had been enacted prior to the publication of the same."

Sub-Section 175 of Section 2685, Compiled Laws of 1897 (The Code), is as follows:

"Sub-Sec. 175. This act shall not apply to or in anywise affect proceeding for habeas corpus, mandamus, prohibition or quo warranto, and shall not affect actions of replevin or writs of attachment, except as to the form of the action."

Referring to the statement of the case of the plaintiffs in error, it conveys no information. The writ of error is not sued out to both decisions of the Supreme Court of the Territory, but only to the second. Neither a writ of error nor an appeal will lie to the first decision of the Territorial Supreme Court, reversing a judgment and sending it back for a new trial. It only lies to a final judgment. That is the judgment affirming the judgment of the District Court; in other words, to the final judgment of the Supreme Court of New Mexico.

This meager statement of facts is followed in the brief of plaintiffs in error by some twenty assignments of error. This practice has time and again been condemned by this court. Only two or three controlling questions can properly be raised on the record of this court, and we will confine ourselves to them.

First: We respectfully submit that attachment is purely a statutory action and no writ can be sued out unless authorized by statute.

POINTS AND AUTHORITIES.

I.

If the Court was right in its determination reversing the case when it was first before the Supreme Court of New Mexico, it follows as a matter of course that the decision of the Court upon the second hearing of the case was right.

II.

The court upon the second hearing instructed the jury to find in favor of the Plaintiffs. The undisputed evidence shows that the title was in the Plaintiffs. This depends primarily upon the validity of the sale under the attachment proceedings, and the discussion of this question involves several propositions which we will discuss separately.

III.

THE NOTICE OF PUBLICATION

Does not state that any property of the Defendant had been attached, to say nothing of its failure to describe the attached property. It informs the Defendant that he has been sued by attachment, and of the indebtedness sued for, and that is all. It did not notify him that his property would be sold to satisfy the judgment that would be rendered against him on his failure to appear. The validity of attachment proceedings depend entirely upon the statute upon which it is based.

Compiled Laws, Sec. 2701, prescribes what the notice shall contain. It is as follows:

"When the defendant cannot be cited, and his property or effects shall be attached, if he do not appear and answer to the action at the return term of the writ, within the first two days thereof; the court shall order a publication to be made, stating the nature and amount of the plaintiffs' demands, and notifying the defendant that his property has been attached, and that unless he appears at the next term, judgment will be rendered against him, and his property sold to satisfy the same; which notice shall be published four weeks successively in some newspaper printed in this

Territory, the last insertion to be not less than two weeks before the first day of the next term; but if there should be no newspaper printed in this Territory, said notice shall be published by not less than six hand bills put up at six different public places in the county, at least six weeks before the first day of the next term."

Section 2701 Compiled Laws of N. M. of 1897.

This subject has been fully considered by our supreme court, and we can not better express what our contention is than quoting the case of Smith vs. Montoya, 3 N. M. 13. The law as settled by this case, has been the settled law of New Mexico up to the present time. It says "Among the necessary parts of the notice to be published in attachment proceedings under the Kearney Code was a notice to the defendant that his property had been attached and that unless he appeared, etc., judgment would be rendered against him, and his property sold to satisfy the same." Compiled Laws 2701. This requirement has never been repealed by subsequent legislation."

The court speaking of the notice in the case it had under consideration says: "The record discloses the fact that the only notice to the non-residents * * * was the notice already set out in full in the statement of the case. This contains no notice to the defendants that their property had been attached, nor that such property would be sold to satisfy the judgment that would be rendered against them on their failure to appear as therein cited."

Smith vs. Montoya, 3 N. M. 13.

In these particulars, the notice in that case, and the notice in this are identically the same. The court proceeds:

"These constituent parts of the notice as provided by statute are certainly material and substantial, and

their omission—their defects not having been cured by a voluntary appearance of the defendants—render the notice ineffectual and void."

"As a citation and notice to non-residents defendants by publication is in derogation of the Common Law mode of personal service, the statutory requirements as to what the notice shall contain must be strictly complied with. Unless this is done, in the case of non-resident debtors who do not appear, the court acquires no jurisdiction for any purpose whatever, as against them or their property.

"Even in proceedings in rem against the property of non-resident debtors, the citation by publication or otherwise, to the defendant, as expressly provided by law, must be given, whereby they may have their day in court, otherwise the court will acquire no jurisdiction or authority to adjudge the sale of their property to satisfy their debts.

"Even when citation and notice by publication, in the mode provided by statute, is given to a non-resident who does not appear, no valid personal judgment can be rendered against him. 5Otto, 714.

"In such case if the non-resident defendant has property within the territorial jurisdiction of the court, the same may be reached by attachment properly instituted, and the court, upon seizure of the property under the writ of attachment and proper notice by publication, so far acquires jurisdiction of the property as a proceeding in rem as to ascertain the pecuniary obligations of the defendant, and to apply the proceeds of the attached property in satisfaction of the same. Id. * * *

'This is all the court could do, in any event, in the present case.

"Everything, therefore, relating to jurisdiction depends upon the regularity and sufficienty of the at-

tachment proceedings. As the proper citation and notice was not published, it follows that the court below had acquired no authority to adjudge a sale of the attached property, to satisfy the plaintiff's demand; and as a legal judgment against the attached property was a necessary prerequisite to a valid judgment against the garnishee, it further follows that the final judgment rendered against the garnishee, Smith, was premature and unauthorized."

Smith vs. Montoya, 3 N. M. pages 22 and 23.

The court in this case held the affidavit to be jurisdictional. The attack was clearly a collateral attack. The garnishee raised the question, insisting that no valid judgment had been rendered against the defendant, by reason of the defects in the notice of publication, and that therefore he could not be compelled to answer. This proposition will hereafter be further considered.

As to the defects in the affidavits, see also

Drake on Attachments Sec. 440.
Durrosett's Adm. vs. Hale 38 Mo. 346.
Atkins vs. Arnick, 25 Mo., 404.
Duxbury vs. Dahle (Minn.), 81 N. W. 198.

Our statute was taken from the Missouri statute of 1845, and while the decision is not binding, as it would have been, if rendered prior to our adoption of the Missouri statute, it is the next thing to it.

IV.

It is necessary that the notice by publication should notify the Defendant that his property has been attached; otherwise the Court without appearance or personal service, acquired no jurisdiction, and the judgment is open to collateral attack.

Smith vs. Montoya, 3 N. M. 13.
Drake on Attachment, Sec. 440.
Durrossetts' Admr. vs. Hale, 38, Mo. 346.
Smith vs. McCutchen, Id. 415.

It is said in Drake in the section above cited that after the rendition of the decision, Durossetts' Admin. vs. Hale supra a notice omitting the clause that "his property" had been attached was held good, and that also a notice stating that "his property was about to be attached" was held good citing.

Moore vs. Stanley, 51 Mo. 317.
Harris vs. Grodner, 42 Mo. 159.

An examination of these cases will show that they were brought under the Missouri statute of 1865. One of the cases, Harris vs. Grodner, 42 Mo. 159, was decided in 1868, and must have been brought under the statute of 1865. In 2 Pattison's Missouri Digest (1st Edition, 1873,) after the citation of this case, is the following note: "(But the statute of 1865 omits the provision contained in Sec. 23 of the revised code of 1865, that the defendant must be notified that his property has been attached.)" 2 Pattison Missouri Digest, page 84, Secs. 62 and 63.

The opinion states that the case of Harris vs. Grodner, 42 Mo. was commenced under the act of 1865.

This case only decides, however, that it was sufficient to notify the defendant that his "property was about to be attached."

It does not hold that a notice would be good without a warning that his property was either attached, or about to be attached, and that unless he appeared, his property would be sold to satisfy the debt sued for.

The opinion in Moore vs. Stanley shows conclusively that the attachment was levied under the act of 1865, which, as we have shown, did not contain the re-

quirements that the notice should state that the defendant's property had been attached. The brief of the respondent also shows this. Wagner statutes, 1872, 1008, Sec. 13 quoted as giving the statute of 1865.

That section relates to suits in partition, divorce, attachment, etc.," and authorizes notice by publication, the material part is as follows: "The court, or clerk in vacation, shall make an order directed, etc., notifying them of the commencement of the suit, and stating briefly the object and general nature of the petition * * * and requiring such defendant or defendants to appear on a day to be named therein, or that the petition will be taken as confessed." Wagner's Mo. Statute 1872, 1008, Sec. 13.

Under this statute it could well be contended that it was necessary to state that the defendant's property had been attached.

None of these cases are binding upon New Mexico courts for the reason that they were decided after we adopted the Missouri statute of 1845, which is as follows: "When the defendant cannot be summoned, and his property or effects shall be attached, if he do not appear and answer the action at the return term of the writ, and within the first six days thereof, if the term shall so long continue, and if not, then before the end of the term, the court shall order a publication to be made, stating the nature and amount of the plaintiff's demand, and notifying the defendant that his property has been attached, and unless he be and appear at the next term, and on or before the third day thereof, if the term shall so long continue, and if not, then before the end of the term, judgment will be rendered against him, and his property sold to satisfy the same."

A comparison will show that this and our statute are identical.

We have discussed the Missouri statutes and decisions at length, for the reason that we took our statute from Missouri.

A reference to the brief of the defendant in error in Smith vs. Montoya, 3 N. M. 13, shows that Harris vs. Gardner, 42 Mo. 159, was cited to the court, and it did not follow it, but followed Durossetts' Admin. vs. Hale, 38 Mo. supera. The latter case is certainly in accordance with sound principles.

As to the notice of publication, Wade or Attachment says: "It should also state, whether the statute so requires it, *that the property of the defendant has been attached* as for a failure in this respect the judgment has been held void."

In the same section, the author says: "It can hardly be doubted that when the usual summons is published, omission of the warning that unless the defendant appeared, judgment would be rendered against him, and that his property sold, etc., would be generally regarded as an incurable defect." In Tennessee it is held that the orders of publication need not recite the levy of the attachment but it is difficult to see how this could be safely omitted from the published notice." Wade on Attachment, Sec. 270. Waples on Attachment is substantially to the same effect.

Waples on Attachment, 268-9, Sec. 5, citing.
Westcott vs. Archer, 12 Neb. 345.
Anderson vs. Coburn, 27 Wis. 558.

In Shinn on Attachment it is said: "There must however, be jurisdiction of the person of the defendant, in some of the modes known to the statute, for without it, the judgment will be void, and its validity may be questioned collaterally.

The publication of notice is intended to be a constructive personal service, and is effective as such for

the rendition of a judgment on the personal demand to the extent of the value of the property seized. But unless the prescribed notice is duly made, the attachment is wholly void. * * *When there is or can be no direct personal service, the publication of notice as required by statute must then be restored to, and such publication must be made in strict accordance with the provisions of the attachment statutes; or the court will not acquire sufficient jurisdiction to render judgment therein." Shinn on Attachment, 425-426-7. Citing:

Haywood vs. Collins, 60 Ill. 328.
Firebaugh vs. Hall, 63 Ill. 81.
Cummingse vs. Tabor, 61 Wis. 185.
Anderson vs. Coburn, 27 Wis. 558.

The Supreme Court of the United States in Harris vs. Hardeman, 14 How. 339, has treated of this subject fully.

It was a case of constructive service by leaving process at the residence of the defendant with some person over a certain age, it embodies exactly the same principle as notice by publication in attachment. The opinion quotes numerous state authorities, laying down the principle we are contending for with approval. It quotes from Hollingsworth vs. Barber, 4 Peters, 466, which was a suit in partition on constructive service. The court quotes as follows:

"The principle is too well settled, and too plain to be controverted, that a judgment or decree, pronounced by a competent tribunal against a party having actual, or constructive notice, of the pending of the suit, is to be regarded by every other co-ordinate tribunal; and that, if the judgment or decree be erroneous, the error can only be corrected by a supreme appellate tribunal. The leading distinction is between judgments and decrees merely void, and such

as are voidable only. The former are binding nowhere, until reversed by a superior authority. The suit and decree are against the unknown heirs of John Abel Hamblin. Instead of personal service of process upon the defendants in the suit, an order of publication was made against them; and upon a certificate of the publication of this order, for eight weeks in an unauthorized newspaper, being produced and filed in the cause, the bill was taken pro confesso, and at the next succeeding term, the final decree was entered, directing the conveyance of the land of the complaintant. Again, that judge, and this court speaking through him says: "It would seem that the court acted without authority, and that the decree is void for want of jurisdiction in the court. But, if not void, as being *coram non judice*, it is void and wholly ineffectual to bind, or prejudice the rights of Hamblin's heirs, against whom the decree was rendered, because they had no notice, either actual or constructive. The principle of the rule, that decrees and judgments bind only parties and privies, applies to the case; for, though the unknown heirs of Hamblin are affected to be made parties in the bill, there was no service of process, nor any equivalent, to bring them before the court so as to make them, in the eye of law and of process, nor any equivalent, to bring them before the court so as to make them in the eye of law and justice, parties to the suit. Here, again, it should be borne in mind that this is not an instance of reversal by an appellate tribunal, for error or irregularity in an inferior court; but a test, collaterally applied by an independent authority, to the character of proceedings, as void or voidable in their nature.

Harris vs. Hardeman, et al., 14 How. 334.

See also, Thatcher vs. Powell, 6 Wheat. 119. This was a case of a tax sale. The statute required a re-

turn of the sheriff that there were no goods or chattels of the delinquent out of which the taxes could be made before a judgment against the land cause, could be entered. The court, through Chief Justice Marshal, said:

"This being an important fact on which the jurisdiction of the court depends, it ought, we think, to appear on record, either in the judgment itself, or in the previous proceedings.

"In this case no report appears to have been made. Could it even be contended that this report might be presumed, the answer is, that the terms of the order excluded such a presumption. It would appear that the report of the magistrate that the land in question had not been listed, was made in July, 1801, and that the court immediately made that order which the law directs to be made on the sheriff's report, that there are no goods and chattels; and this order refers not to any report of the sheriff, not to any deficiency of the goods and chattels, but to the report of the justice of the peace, that the lands have not been listed.

"This is not the only defect which appears in these proceedings. Previous to an order for a sale of land, and subsequent to the report of the sheriff, certain publications are to be made in the manner and form prescribed by the act. These publications are indispensible preliminaries to the order of sale. They do not appear to have been made. The judgment against the land was given at January term, 1802, on motion without its appearing by recital, or otherwise, that the requisites of the law, in this respect, had been complied with, and that the tax still remained unpaid.

"We think this ought to have appeared in the record.

"The argument is, that the judgment, for these er-

rors in the proceedings of the county court, may be voidable, but is not void; that until it be reversed, it is capable of supporting those subsequent proceedings which were founded on it.

"We think otherwise. In summary proceedings, where a court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction, ought to appear, in order to show that its proceedings are *coram judice*. Without this act of assembly, the order for sale would have been totally void. This act gives the power only the court jurisdiction and without it, the court is as powerless as if the act had never been passed."

Thatcher vs. Powell, 6 Wheat. 119.

This, and the preceding cases have been followed and cited by innumerable courts, both state and federal, and has never been overruled and modified. It is difficult to see any difference in principle between the case of an attachment.

It has time and again been held, and it is said that: "The rule is inflexible that when a court or judicial officer exercises a special statutory power outside the scope of the usual jurisdiction of courts of general powers, the records of the proceedings must show that the statutory authority has been pursued, and in this regard of limited and inferior jurisdiction."

Cowdery vs Town of Caneadea, 16 Fed. Rep 532.

In Gray vs. Larrimore, 10 Fed. Cases, 1028, 4 Saw., 638, Judge Field said:

"It is a familiar doctrine, that the jurisdiction of any court over either the person of the defendant or of the subject matter may be inquired into whenever any right or benefit is claimed under its proceed-

ings. The want or jurisdiction will render its judgments and decrees unavailable for any purpose. Borden vs. Fitch, 15 Johns. 140; Williamson vs. Berry. 8 How. (49 U. S.) 541. The doctrine is as applicable to proceedings of courts of superior or general authority as it is to courts of inferior or limited authority. The difference between these courts in this respect relates only to the presumptions raised by the law. With reference to courts of general or superior authority, jurisdiction is presumed until the contrary appears; but with reference to courts of inferior or limited authority, the jurisdiction must be affiirmatively shown by parties who claim any right or benefiet under their proceedings. Mills vs. Martin, 19 Johns. 33; Bloom vs. Burdick, 1 Hill, 140.

"The general presumption indulged in support of the judgments and decrees of the superior courts is, however, limited to jurisdiction over persons within their territorial limits; persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law. When ever it appears, either from inspection of the record, or by evidence outside of the record, that the defendants were at the time of the alleged service upon them beyond the reach of the process of the court, the presumption ceases, and the burden of establishing the jurisdiction over them is thrown upon the party who invokes the benefit or protection of its judgments and decrees. So, too, the presumption ceases when the proceedings are not in accordance with the course of the common law. With reference to such proceedings, the superior courts, though in other respects, possessing general authority, exercise only a limited and special jurisdiction."

Gray vs. Larrimore, 10 Fed. Cases, page 1028.

The same judge even more forcibly stated the same proposition in Galpin vs. Page, 3 Sawyer 93, 9 Fed Cases, 5206. The case was before the supreme court and the same principle announced. Galpin vs. Page, 18 Wall, 350. These cases are all cases of constructive service, and for defect in it held the judgments subject to collateral attack. In another case of constructive service, the supreme court held even as to a court of general jurisdiction, proceeding under its general powers:

"We do not question the doctrine that a court of general jurisdiction acting within the scope of its authority—that is, within the boundaries which the law assigns to it with respect to subjects and persons—is presumed to act rightly and have jurisdiction to render the judgment it pronounces, until the contrary appears. But this presumption can only arise with respect to jurisdictional facts concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or avertments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge. But if the record give the evidence or make an avertment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred. 'If, for example,' to give an illustration from the case of Galpin vs. Page (18 Wall. 366), it appears from the return of the officer or the proof of service contained in the record that the summons was serve at a particular place, and there is no overment of any other service, it will not be presumed that service was also made at an-

other and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed in the silence of the record, that it was made upon the defendant also."

Galpin vs. Page 9 Fed Cases 113, Case 5206.

Cases could be multiplied on this point, but we deem those already quoted sufficient.

U. S. vs. Allen, 14 Fed. Rep. 264.

Wayman vs. Campbell, 6 Porter 219; 31 Am. Dec. 677.

Gunn vs. Howell, 27 Ala. 663, 62 Am. Dec. 785.

Bradley vs. Jamison, 4 Iowa, 73.

Wright vs. Werner, 1 Douglas (Mich.)

Whitney vs. Lrunette, 15 Wis. 68.

Malone vs. Samuel, (Ky.) 13 Am. Dec. 180 Note.

"In some jurisdictions it has been held that the court acquires jurisdiction over the property by a valid levy, and its judgment in regard there to is binding until reversed on appeal or set aside in some direct proceedings for that purpose. But the weight of authority, if not of reason, is to the effect that the jurisdiction acquired by the seizure of the property is not to pass absolutely upon the rights of the parties, but only to pass upon such rights after defendant has been given an opportunity to appear and defend, and when this view is maintained, a judgment rendered without the notice prescribed by law against a defendant who has not appeared is deemed absolutely void and open to collateral attack." 4 Cyc. of Law and Procedure, 814-5, citing cases from Alabama, Georgia, Colorado, Illinois, Michigan, Texas, Tenneessee, Virgin-

ia, West Virginia, Wisconsin.

Jackson vs. Shepeard, 17 Am. Dec. 506 Note.

The case of Cooper vs. Reynolds, 10 Wall. 308, is much relied upon by the plaintiffs in error for the proposition, that the court having acquired jurisdiction by the seizure of the property, defective or irregular affidavits and publication notices, though they might reverse a judgment on appeal, do not render the judgment or subsequent proceedings void. An examination of the case will show that much depended upo nthe statute of Tennessee, which was under consideration by the court. When Smith vs. Montoya, 3 N. M. supra, was decided this case was before the courts. It will be found cited in the brief of defendant in error, 3 N. M. 15.

The rule laid down in Smith vs. Montoya has always been the recognized law of this Territory, and it is now too late to seek to overturn it. The Tennessee statute providing for notice by publication is quoted on page 31. It is entirely different from our statute. The statement of fact says: "Publication was ordered by the court to be made in the Knoxville Whig, (a paper of the county) notifying the defendants to appear and plead answer or demur, or that the suit would be taken as confessed, and proceeded in ex parte as to them. The record did not, however, set forth the notice which was published, if any was, though it did set forth the order for publication which was entitled "Order for publication, and the publication as made in the Knoxville Whig," making it appear perhaps that the omission to set forth the notice was a clerical error. The record went on to say "that the defendant, Reynolds, and the others being solemnly called to come into court, came not, but made default, and it appearing, the record proceeded that the

attachment had been duly levied on the defendant's property, and that publication had been made according to law, it was ordered that the plaintiff should recover his damages, etc."

The court in its opinion proceeds to consider the subject of jurisdiction; as to jurisdiction of the rest it says:

"Jurisdiction of the res is obtained by a seizure under process of the Court, whereby it is held to abide such order as the Court may make concerning it. The power to render the decree or judgment which the Court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject matter of the cause. 10 Wall Page 347.

The court then says in effect that the res in the case of real estate is brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court.

The court also says:

"We do not deny that there are cases which not partaking of the nature of proceedings in rem, when the judgment is to have an effect on personal rights, as in divorce suits, or in proceedings to compel conveyance, or other personal acts, in which the legislature has properly made the jurisdiction to depend on this publication of notice, or on bringing the suit to the notice of the party in some other mode when he is not within the territorial jurisdiction."

While the court in conclusion bases its conclusion on what it considers sound principles, it says: *"And after a careful examination of the reported cases on this subject, we believe this to be the law as held by the courts of Tennessee."*

It is undoubtedly the rule of the supreme court to follow the decisions of the state courts on the con-

struction of their local statutes. The law as held by the supreme court of Missouri, and or own supreme court based on our statute is certainly otherwise as to the notice of publication required. The opinion of this case does not pretend to hold that a statute might not be enacted which would make the publication of the notice a jurisdictional matter in attachment cases, as well as in divorce cases. In one of the quotations we have made the opinion says that after the seizure, the court says:

"The power to render the decree or judgment which they may undertake to make in the particular case, depends upon the nature and extent of authority vested in it by law in regard to the subject matter of the cause.'

The contention of plaintiffs in error all through their brief is that the court can acquire jurisdiction by simply determining that it has jurisdiction, which is not supported by any authority of this court.

V.

The case of Cooper vs. Reynolds has been cited and discussed frequently. We will as briefly as possible refer to some of these cases considering it.

Earl vs. McVeigh, 91 U. S. 503 was a case of constructive service, by posting on the front door of his "usual place of abode." The opinion says:

"Even in proceedings in rem, notice is requisite in order that the sentence may have any validity. Every person said Marshal, C. J., may make himself a party to such proceeding, and appeal from sentence, but notice of the controversy is necessary, in

order that one may become a party, and it is a principle of natural justice, of universal obligation, that, before the rights of an individual can be bound by a judicial sentence, he shall have notice either actual or implied, of the proceedings against him. The Mary, 9 Cranch, 144. No man shall be condemned in his person or property without notice and an opportunity to be heard in his defense, is a maxim of universal application, and it affords the rule of decision in this case." Earle vs. McVeigh, 91 U. S., 510.

In Guaranty Trust Co. vs. Green Cove Railroad Co., 139 U. S. 146-148, is a case of foreclosure of a mortgage, on constructive service of process, as already shown this is a proceeding in rem purely, if there is no service of process. The court said:

"The case of Cooper vs. Reynolds was one where property was seized by virtue of an attachment taken out at the commencement of the suit in which the proceedings to call in the non-resident defendant were had, and the record asserted that publication had been made according to law.' Indeed, Mr. Justice Miller, said in that cast, p. 319, 'we do not deny that there are case * * * in which the legislature has properly made the jurisdiction to depend upon this publication of notice, or of bringing the suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction."

"It was said by Mr. Justice Wayne, in Williamson vs. Berry, 8 How. 495, 540, in reply to an argument that a decree in chancery could not be looked into in a collateral way, that 'it is an equally well settled rule in jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings of the former are relied upon, and brought before the latter, by a party claiming the benefit of such pro-

ceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court or court of common law."

"The decisions of this court upon this subject, beginning in the year 1794 with the case of the Betsey, 3 Dall. 6, have been uniform and consistent. The following are a few of the leading cases upon this subject.

Rose v. Himely, 4 Cranch 241.
Elliot v. Piersol, 1 Pet. 328.
Wilcox v. Jackson, 13 Pet. 498.
Shriver's Lessee v. Lynn, 2 How. 750.
Shriver's Lessee v. Lynn, 2 How. 43.
Webster v. Reid, 11 How. 437.

"In the last case it was held that where jurisdiction had been sought to be obtained by publication as in this case, it was necessary to show that notice had been given by publication as the act required. "If jurisdiction," says the court, 'could be exercised under the act, it was essential to show that all its requisites had been substantially observed. It was necessary for the plaintiff to prove notice, the negative that proof was not given, under such circumstances would not be rejected."

"In Hunt vs. Wickliffee, 2 Pet, 201, an order was made by the state court of chancery for a non-resident to appear, and that a copy be published 'for eight weeks in succession agreeably to law." and it was held that as the laws of Kentucky only authorized their courts of chancery to make decrees against absent defendants on the publication for two months successively, the order of the court of chancery for a publication for eight weeks was not a compliance with the law, the supreme court of Kentcky having decided that the publication must be continued for two

calendar months. Under this construction of the act, the decree was made against persons who were not parties to the suit, and it held that it could not affect them. So in Galpin vs. Page, 18 Wall. 350, it was held that when by legislation of a state constructive service of process by publication is substituted in place of personal service, the statutory provision must be strictly pursued in order to bind a citizen of another state not personally served. "Whenever," says Mr. Justice Field, "it appears from the inspection of the record of a court of general jurisdiction, that the defendant against whom a personal judgment or decree is rendered was at the time of the alleged service without the territorial limits of the courts, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, andthe burden of establishing the jurisdiction is cast upon the party who invokes the benefit of protection of a judgment or decree. * * * * * * When. therefore, by legislation of a state, constructive service of process, by publication is substituted in place of personal citation * * * every principle of justice exacts a strict and literal compliance with the statutory provisions."

"Pp 368, 369. ater cases to the same effect are:
Earle v. McVeigh, 91 U. S. 503.
Settlemier v. Sullivan, 97 U. S. 444.
Cheely v. Clayton, 110 U. S. 701.
Applegate v. Lexington, etc. Mining Co., 117 U. S. 255."

"And there is scarcely a state in the union in which the same principle has not been announced and reaffirmed."

Guaranty Trust Co. vs. Green Cove R. R. Co., 139 U. S. 148.

Foreclosure of Mortgage is a proceeding in rem. 119 U. S. 182.

In Freeman vs. Alderson, the court through Mr. Justice Field, speaking of attachment, said: "The court acquires jurisdiction over the property in such case by its seizure, *and of the subsequent proceedings by public citation to the world of which the owner is at liberty to avail himself by appearing as a claimant in the case.*" Freeman vs. Alderson, 119 U. S. 187. See also McDonald vs. Cooper, 32 Fed. Rep. 751.

The court can acquire no jurisdiction without a valid writ, which we hereafter discuss.

We submit that the question is one of the construction of our statute, and we firmly insist that our supreme court in Smith vs. Montoya was right in holding that Cooper vs. Reynolds did not apply in case of a statute like ours.

In this connection we cannot forbear to cite the case of Windsor vs. McVeigh, 93 U. S. 274. We cannot attempt to quote from the voluminous opinion, but quote from the syllabus as follows:

"The jurisdiction acquired by the seizure of property, in a proceeding in rem for its condemnation for alleged forfeiture is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges for which the forfeiture is claimed. To that end, some notification of the proceedings, beyond that arising from the proceedure, prescribing the time within which the appearance must be made is essential."

VI.

There is no authority under our statute for the issu-

ance of an alias writ of attachment and as there can be no seizure without a writ, it was not within the power of the Court to render any decree or determine the question of its jurisdiction.

It is no writ at all, and no valid levy or seizure could be made under it. The first writ had been levied on certain land or town lots of the defendant, and after the notice of sale had been published, the last publication being on April 14th, the plaintiff in attachment on the 11th day of May, without any new affidavit and bond procured what is called an alias writ of attachment and pretended to have it levied on the defendant's interest in this mine. The validity of plaintiffs in error title depends on the validity of this writ. There is no such thing as alias writ of attachment under our statute. The statute relating to attachment and process are as follows:

"Original writs of attachments shall be directed to the sheriff of the proper county, commanding him to attach the defendant, by all and singular, his lands and tenements, goods, moneys, effects and credits, in whosoever hands the same may be found, with a clause of the nature and to the effect of an ordinary citation to answer the action of the plaintiff." Sec. 2696, Complied Laws (1897.)

"Original writs af attachment shall be issued and returned in like manner as ordinary writs of citation; and when the defendant is cited to answer the action, the like proceedings shall be had between him and the plaintiff as in ordinary actions on contracts, and a general judgment may be rendered for or against the defendant." Sec. 2697, omplied Laws (1897.)

"Hereafter in any civil suit pending, or which hereafter may be brought, when the summons against the defendant has been returned, executed the plaintiff, his agent, or attorney, may, at any time before

judgment, file an affidavit with the clerk of the court in which the suit is pending, and give bond with security as in cases of original attachments; and thereupon the clerk must issue an attachment, returnable as in other cases of original attachments." Sec. 2721 supra.

"In all cases when attachments are sued out ancillary to the original suit, the suit must thereafter proceed in all respects as if it had been commenced originally by attachment." Sec. 2733, supra.

This last section was followed by another section authorizing the court to require additional security Acts of 1884, Chap. 3.

Certain provisions of the code were appealed to on the trial below as counterancing an alias writ of attachment. We quote them.

Comp. Laws, (1897), Sec. 2685. Sub, Sec. 28: "When any process has not been returned, or has has been returned without service, or has been improperly served, it shall be the duty of the clerk, upon the application of any party to the suit, to issue other process to the same or any other county, as the party applying may direct."

Sub-Sec. 131: "Any interluctory judgment may for good cause shown, be set aside at any time before the damages are assessed or final judgment rendered upon such terms as shall be just."

Sub-Sec. 134. "No motion to set aside any finding a judgment rendered out of term time shall be entertained unless it shall be filed and acopy thereof served upon the opposite party within ten days after the entry of such finding or judgment."

Sub-Sec. 137: "Judgments may be set aside for irregularity, on motion filed at any time within one year after rendition thereof."

We respectfully submit that they have not the remotest bearing on the subject.

The word "original attachment" in Secs. 2696-7, is used to distinguish it from the writ in ancillary attachment, as used in Sec. 2721.

Proceeding by attachment, is wholly statutory, in derogation of the common law, and its rules will be strictly construed, * * * and a court which exercises such extraordinary jurisdiction, is only justified in acting under its special powers limited by that statute according to the forms of procedure it prescribes.

1 Shinn on Attachment, Sec. 8.

See also

1 Wade on Attachment, Secs. 2, 3, 4.

Waples on Attachment, 24 Sec. 7.

3 Am. and Eng. Ency. of Law, 184, (2d Ed.)

It is useless to multiply authorities on this proposition.

"A second or alias writ is in general unauthorized, because the affidavit, for the first does not necessarily show the existence of the same state of facts at the subsequent time of issuing the second. In West Virginia and Texas, more than one attachment may issue on one affidavit and bond, and if the subsequent one is regular, it will cure the defects in the first." 1 Shinn on Attachment, Sec. 198, citing Denison vs. Blumenthal 37 Ill. App. 385, which will be found directly in point.

The cases cited from West Virginia and Texas show that such a writ is expressly authorized, and serves simply to emphasize our contention. The West Virginia statute provides that: "Several such orders may be issued and delivered to different officers at the same time or at different times. This clause would authorize the second order of attachment, etc." Bal-

lard, etc., vs. Great Western, etc., Co., 39 W. Va. 394, 19 S. E. 510.

In the Texas case, the statute is as follows: "Several writs of attachments, may at the option of the plaintiff, be issued, and sent to different counties, until sufficient property be attached to satisfy the writ." Branshaw vs. Tins.

4 Tex. Civ. App. 131, 23 S. W. 184.

We cannot forbear to quote at length a decision from Illinois, Pack Woods & Co., vs. American Trust & Savings Bank, 172 Ill. 192, 50 N. E. 327 as follows: "The chief question presented by this record is, can a second attachment in aid be issued in the same suit after a return of the first writ unexecuted? There seems to be a dearth of authorities on this question, the only ones to which we have been referred being Dennison vs. Blumenthal, 37 Ill. App. 385; Hamill vs. Phenicie, 9 Iowa, 525; Elliott vs, Stevens, 10 Iowa 418; and Branshaw vs. Tingley, 4 Tex. Civ. App. 131, 23 S. W. 184. The foreign cases are under statutes differing from ours, and we are disposed not to regard them as applicable here. In the case of Dennison vs. Blumenthal, supra, the appellate court for the First District held that an alias writ of attachment was not authorized, being in derogation of the common law deriving all their validity from the statute, must conform in all essential particulars to the requirements of the statute. Cariker vs. Anderson, 27 Ill. 358. In the Dennison case, Mix, one of the garnishees, was brought in by an alias writ of attachment issued more than 16 months after the original, and more than a year after judgment by default against the defendants, no additional affidavit or bond having been given; and the court held that no notice of it, in any mode recognized by law, could be given to the defendants. In the case at bar the suit was be-

gun by the issuing of a summons. Then a writ of attachment in aid was regularly sued out and returned unexecuted, as was also the summons. There was nothing more done until two months later when a new affidavit and bond were filed and a new writ of attachment issued and served on defendant in error. Was this an alias writ? Plaintiff in error contends that it was not, as it was not issued on the first affidavit and bond, but on a new affidavit and bond. An alias writ is a second writ issued where one of the same kind kind has been issued before in the same cause, when the former writ has not produced its effect. Counsel for plaintiff in error probably filed the second affidavit and bond in view of the language used in the Dennison case, that the original bond does not cover damages caused by the wrongful issue of an alias writ. The second writ here in controversy does not contain the words, 'as we have formerly commanded you,' ('sicut alias praecepimus'), from which the alias writ derives its name; but because of such omission was it any less an alias writ? It was a second writ issued in the same cause, the first writ having failed to produced its effect; and the additional affidavit and bond, in the absence of statutory authority, for a second attachment in aid, can no more be held to change it from an alias writ to an original writ than a praecipe for a second summons in the same cause can be held to call for an original summons and not for an alias summons. As aside by the appellate court, attachments are in derogation of common law, being creatures of statute only; and it is the rule that such statutes, except when otherwise provided, must be strictly construed. The attachment act provides that it shall be construed in all courts in the most liberal manner, for the detection of fraud. But no question of that character arises here. The statute provides that

an attachment in aid of a pending suit may be sued out on certain conditions, and that such proceedings shall be had thereupon as are required or permitted in original attachments, as near as may be. 1 Starr & C. Ann. Art. 11, Sec. 31. The first section provides that a creditor may have an attachment in certain specified cases. No provision is made anywhere for more than one writ, except in section 13, which provides that 'an attachment writ' may be issued to any other county in the state where the debtor may have property liable to be attached. It is contended, because section 33 provides that 'upon the return of attachments issued in aid of actions pending,' etc., it is thereby implied by the use of the word 'attachments,' that more than one writ of attachment may be issued but the plural 'attachments' was evidently used to correspond with the plural 'actions pending' immediately following, and the whole section gives no countenance to the position contended for. As the statute nowhere provides for more than one writ of attachment to the same county in the same suit, we think the issuing of the alias writ was unauthorized, and no jurisdiction was obtained by the court by the service of the same on the garnishee."

Pack, Woods & Co., vs. Am. Tr. & Sav. Bk. 172 Ill., 192; 50 N. E. Rep. 327.

It is particular valuable because it cites the cases from West Virginia, Texas, and Iowa, and says they are applicable. It will be seen that the Illinois statute is almost identical with ours. See also:

Carr vs. Kelley Brew. Co., 94 Ill. App. 225.

American Hydralic Dredging Co., vs. Richardson etc., 90 Ill. App. 376.

Buck vs. Cay, 73 Id. 160.

Dennison vs. Bumenthal, 37 Ill. App. 385.

In State vs. Noblett, (N. J.) 47 Atl. 438, a general appearance was entered and the court held that there could be no alias writ issued. Here the notice of publication had been made and plaintiff was entitled to default.

State vs. Noblett 47 Atl. 348 (1900.) See also.

Wilson vs. Strickler, 66 Ga. 575.

Harris vs. Linnard, 9 N. J. Law 58.

Cummings vs. Blair, 18 N. J. Law 328.

Del Hayo vs. Brundred, 20 N. J. Law, 328.

In some states, second, or alias attachments may be issued, but new bonds, affidavits and notice of publication are conditions precedent to second or alias writ and a valid levy there under, and unless they are complied with, the second, or alias writ, is void.

It must be supported by new affidavits, or new bond. In some states, plaintiff must commence de novo. So in Missouri.

Favrot vs. Dell Piane, 4 La. Am. 584.

The Iowa cases are much relied upon by plaintiffs in error. An examination of these cases will show that in Iowa when the statute authorizes an alias writ, the alias should refer to the preceding writ, showing its issue and the amount levied under it.

Hamil vs. Phenicie, 9 Iowa, 525.

Nothing shows more clearly that there can be no alias writ under our statute, based on the first affidavit and bond, than the fact when successive attachments are sued out in the same suit, on different grounds, the lien of attachment does not relate back to the first attachment.

Miller vs. White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. 791.

VII.

Abandonment of the levy under the original writ is an abandonment of the seizure of the rem which alone gave jurisdiction to the Court to proceed with the cause. That alone authorizes notice of publication, or any other step, after the filing of the affidavit and bond and issuance of the first writ.

Drake on Attachment, Sec. 202, 257, 290.

It is indispensable that there should be a valid levy. The levy is a prerequisite; as a rule the attachment takes place first, the advertisements and all subsequent steps, afterwards. It is absurd to say that a levy can be made, the advertisements and subsequent steps taken, the levy first made abandoned, and other property be levied upon, on an unauthorized writ, and sold to satisfy the debt.

1 Wade on Attachment, Sec. 272.
Smith vs. McCutchen, 38 Mo. 417.
See especially, Pennoyer vs. Neff, 95 U. S. 728.

In Missouri when the creditor caused property of his debtor to be attached, sufficient in value to discharge the debt, and pending the litigation the property was lost, it was held the creditor could not afterwards enforce his demands by another attachment against the property of the debtor; and that after sequestering a sufficient amount of assets to pay his debt, the estate of such debtor was discharged.

Kendricks vs. Huff, 71 Mo. 570.

See also Brown vs. Isbell, 11 Ala. 1009, where second writ was quashed because sufficient property was levied on under the first writ.

When there is an outstanding levy, no alias exe-

cution can issue. The same should apply to attachments.

1 Freeman on Executions Sec. 50.

Freyer vs. McNoughton, 67 N. W. 987 Mich.

Tropnell vs. Richardson, 58 Am. Dec. 338.

To fortify our claim as to this second writ, we refer to several decisions that the writ must be issued within a reasonable time after the making of the affidavit.

Adams vs. Lookwood, 30 Kan. 373, 2 Pac. 626.

Avery vs. Good, 114 Mo. 320, 21 S. W. 815.

O'Neill vs. New York, etc. Mining Co., 3 Nev. 141.

Foster vs. Illinki, 3 Ill. App. 345.

Lewis vs. Stewart, 62 Texas, 352.

Horton vs. Monroe, 98 Mich. 195, 57 N. W. 109.

Especially: Spreen vs. Delignore, 94 Fed. 71.

VIII

A valid levy is the *sine qua non* and absolutely necessary to confer jurisdiction according to plaintiffs in error as they insist, under Cooper vs. Reynolds, supra.

Without a valid levy the Court is without jurisdiction —without a valid writ there can be no valid levy. On real estate an unauthorized writ is no writ. Jurisdiction of the res is obtained by a seizure under process of the Court whereby it is held to abide such order as the Court may make concerning it. If there is no valid process, there can be no seizure.

In Cooper vs. Reynolds, it is said:

"Second, the court in such a suit cannot proceed

unless the officer finds some property of defendant's on which to levy the writ of attachment. A return that none can can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court." 10 Wall. p. 318.

See especially Dohr vs. Pohr, 82 Va. 359, 3 Am. St. 106, which also reviews Cooper vs. Reynolds, and shows that it does not apply to a case like this.

See also McGillian vs. Claflin, 52 Fed 657.

Plummer vs. Hatton, 51 Minn. 183, 53 N. W. 461.

Tuffs vs. Volkening, 51 Mo. Appeals.

The last case holds that publication can not precede levy.

Grigsby vs. Barr, 14 Bush. 139.

Mickey vs. Stratton, 5 Sawyer. 483, F. C. 9530.

Keyser vs. Guggenheim, 21 S. E. 475-6, 91 Va. 320.

In Ludlow vs. Ramsey, 11 Wall. 588, the court referring to Cooper vs. Reynolds, says:

"The writ of attachment appears to be in due form, and to have been regularly served on the property so that the court became fully possessed of jurisdiction over the case."

Thus conclusively showing that whatever may be the construction placed on Cooper vs. Reynolds, it does not dispense with a valid writ and levy. 11 Wall. 588.

See also: Avery vs. Warner, 59 Tenn, (12 Heisk) 559.

Peters vs. Conway, 67 Ky. 565.

Nance vs. Barber, 26 S. W. Reporter, 151, holding that the levy of a writ of attachment after the return day creates no lien.

Freeman on Judicial Sales, Sec. 8.

This author says: "A writ issued when the plaintiff is not entitled to it cannot support a judgment founded on it." Freeman on Void Judicial Sales, Sec. 3, p. 12.

We also call the attention of the court to Sec. 2702, of the Compiled Laws of 1897, with reference to notice by publication. This statute expressly provides that "where the defendant cannot be served personally with the process, and shall have no place of residence in this territory, and the property of the defendant shall have been attached in time to make the necessary publication, as now required by law, the officer executing the process, or the agent, or attorney of the plaintiff in said cause, is hereby authorized to make publication of notice to the defendant, etc."

It will thus be seen that the statute itself makes attachment of the property a condition precedent to giving notice by publication. It seems impossible therefore to conclude that an alias writ of attachment could be sued out after notice of publication and levied under the first writ abandoned. Under this alias writ, levy was made upon entirely different property, and the court proceeded to judgment thereon. This statute makes the jurisdiction to publish the notice depend upon a previous valid attachment.

IX.

It is contended that the attack on the judgment in Smith vs. Montoya, 3 N. M. 13, was not a collateral attack. How such a conclusion can be reached, it is difficult to say. The Court in its opinion treats it as a collateral attack. It is the duty of the garnishee to see that the Court has jurisdiction to render a judgment against the defendant. It extends no further. He cannot

question the judgment for errors that are merely reversible.

Dennison vs. Blumenthal, 37 Ill. App. 385.
Waples on Attachment, 515.
2 Wade on Attachment, Sec. 326-399, p. 136; 521 p. 388.
Laidlaw vs. Morrow, 44 Mich. 547.
Withers vs. Fuller, 30 Gratt, 547.
Jackson vs. Shipman 28 Ala.
Bean vs. Barney, 10 Iowa, 498.

X.

The plaintiffs in error rely much upon Voorhees vs. The Bank, 10 Peters, 470, for the proposition that this sale could not be collaterally attacked. We cannot attempt in this brief to notice all the cases cited upon that proposition, but as Voorhees vs. Bank is cited in Cooper vs. Reynolds, 10 Wall., we will briefly notice that case. A careful reading of this case will show that as to the defects and irregularities in the proceeding, alleged as a ground for attack upon the sale of the property, the record was silent; except allegations in the record that the law had been complied with. The Court says:

"The process which they adopted was the same as prescribed by law; they ordered a sale which was executed, and on the return thereof, gave it their confirmation. This was the judgment of a court of competent jurisdiction on all the acts preceding the sale, affirming their validity in the same manner as their judgment had been affirmed the existence of a debt. There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; this rule applies as well to every judg-

ment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself without referring to the evidence on which it has been adjudged."

This case is entirely different from the cases which we have cited, some of them are of the same court, holding that where the record speaks, it is presumed to speak the truth, and if what is shown on the record affirmatively, shows that acts necessary to give the court jurisdiction had not been done, then the judgment can be collaterally impeached. The record is presumed to speak the whole truth in reference to a proceedure of this kind.

The opinion further says:

"They have adjudged that the order of sale was executed agreeably to law—nothing appears on the record to impugn their judgment it must, therefore, be taken to be true in fact and valid in law." The authorities cited, show that this is as far as the case goes. For instance, it quotes as follows: 'When a court has jurisdiction, it has a right to decide every question that arises in the cause; and whether the decision be correct, or not, its judgment until reversed is regarded as binding in every other court."

This is very far from saying a court has jurisdiction simply because it determines that it has jurisdiction. If this principle is to be indulged, it is wholly immaterial whether the court has jurisdiction or not. It is not the law, or the existence of the necessary fact that confers jurisdiction, but the assumption by the court that it has jurisdiction, that confers it. This is a begging of the whole question, and this case is

no authority for any such proposition, nor is any other case that can be cited.

What we have said also applies to Grignon vs. Astor, 2 Howard 319 Harvey vs. Tyler, 2 Wall., and the other cases cited by the court in the note to the original report of Cooper vs. Reynolds.

The opinion in that case is itself a full explanation of the scope of these decisions, that is jurisdiction must have attached before the determination of the court can be made as to the preliminary steps necessary to authorize judgment. If the record is silent, they may be presumed. If it speaks, what it says must be taken to be the truth and the whole truth. If statute makes them jurisdictional, and this record affirmatively shows the absence of such jurisdictional facts, the judgment is open to collateral attacks.

A reference to 3 Notes on U. S. Reports, 594, will show the inumerable decisions in which this case has been cited and commented upon, and fully sustains our contention as to the scope of the decision. We call especial attention to that part of the note under the heading "Judgment Without Jurisdiction, is of no effect." p. 474. 3 Notes on U. S. Reports, 603.

Graff vs. Lewis, 71 Fed. Rep. 591, is another case much relied upon by plaintiffs in error. What we have said as to Vorhees vs. Bank, also applies to it. It says:

"The contention of the plaintiff is that the validity of the defendant's title depends upon the validity of the proceedings in the attachment suit, and the validity of these proceedings depends upon the question of whether there was a valid writ of attachment issued which in turn depends upon the question whether the affidavit filed in the case as the basis for the issuance for the writ fully met the requirements

of the statute of Nebraska, so as to justify the issuance of the writ."

This case is simply in line with the cases last above referred to, the court having jurisdiction by a seizure under a valid writ, could determine whether the affiidavit complied with the statutes, and if it was in error as to this, its determination could not be reached by collateral attack.

XI.

ESTOPPEL.

Plaintiffs in error argue that Dye, the plaintiff below, was estopped from asserting title to this mining claim short of the period of the statute of limitations; that by acquiescence or some sort of a fanciful application of the doctrine of election, he was cut off from asserting his rights to this claim. They do not cite a single authority in the brief which sustains any such propositions.

They quote in the lower court from *Sec.* 818, 2 *Pomeroy's Equity Jurisprudence,* on the doctrine of acquiescence as an estoppel to right of property or of contract. We quote the last sentence of the section cited:

> "Of course, it is essential, that B should be acting in ignorance of the real condition of the title, and in the supposition that he was rightful in his own dealing."

See 2 Pom. Eq. Jur., 3rd Ed., Sec. 818 and numerous authorities there cited as to the application of this doctrine.

Section 821 of the same author ,referring to this application of the doctrine of estoppel, says:

> "The most striking instance of the estoppel recognized by courts of equity is that already

described in a former paragraph, wherein by intentional misrepresentation, misleading conduct, or wrongful concealment a party may preclude himself from asserting his legal title to land."

This state of facts is exactly what has never been shown in this case—that there was any intentional concealment or that Dye knew the state of the title when he was aked about it. We will hereafter show by decisions of this court that wherever the title is of record and is open to both parties alike, there can be no estoppel. In this case the evidence is clear and distinct that Heiniman and Crary employed an attorney to examine the title for them and that it was of record. We come to this later.

We have examined the authorities cited by plaintiffs in error.

Power vs. Larrabee, 75 *N. W.* 789, was a case, not of a void sale of property, but where it was claimed it was sold for an inadequate price and in equity long acquiescence in the judicial sale was held to prelude the raising of the question as to the adequacy of the price.

Black vs. Elkhorn Mining Co.,, 163 *U. S.* 445, simply holds that there can be an abandonment of a mining claim or of an undivided interest in one, and that an abandonment consists in leaving the possession without any intention of returning, under the circumstances of that case. It cannot be claimed that there was any abandonment of the rights of Dye, without an intention to abandon and without full knowledge of his rights, and he testifies that he didn't know his rights until he got a legal opinion as to what his rights were, and they were legally intact, and the Supreme Court of the United States has held that a valid

mining claim in force is property, and our statute makes it real estate.

Golden Tierra Min. Co. vs. Mahler, 4 *Mor. Min. Reps.* 390, is a case where there was a deliberate, willful concealment and deception by representations that the ground was open to location when it wasn't and the party making the representations had a location notice posted on it and attempted afterwards to set it up.

Bigelow on Estoppel, 562, 601, is no authority for the proposition. The first citation is to the effect that a party cannot either in the course of litigation or in dealings *in pais* occupy inconsistent positions. There has been no change in the position of the defendants in error so far as litigation is concerned and there have been no dealings *in pias* whatever between the plaintiffs in error and Dye in this case. This refers to where there is some privity or contractual relations between the parties.

The second citation in this connection is 601, which refers to inconsistent positions in court, and has no application whatever to this case.

The quotation from 2 *Smith's Leading Cases*, refers to a claimant of property sold under execution standing by and permitting his property to be sold and knowingly permitting third persons to change their status and part with value. Under such circumstances he is under obligation to speak. It has no sort of application to a case like this.

The cases of *Maple vs. Kussart*, 91 *Am. Dec.* 214 *and Spragg vs. Shriver*, 64 *Am. Dec.* 698, are cases of positive affirmative acts in encouraging the purchaser and of absolute waiver to any claim to the property.

The general proposition that estoppel by declarations or estoppel *in pais* which operates in favor of a grantor may be available for his grantee is not denied

by defendants in error, but this doctrine has no application whatever to this case. *The plaintiffs in error against whom this judgment runs purchased this property in the face of a lis pendens, with a suit actually pending for the recovery of the property;* and we challenge them to find any case which would authorize the application of the doctrine in favor of a purchaser under such conditions.

The section cited from 2 *Pomeroy, 3rd Ed.,* ends with this sentence:

"Since the whole doctrine is a creature of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence otherwise no equity will arise in his favor."

2 Pomeroy Eq. Jur., Sec. 813 and note.

From the fact that defendant in error Dye was a lawyer, knowledge of his rights and of what the record of a case showed is no more to be imputed to him than it is to be imputed to plaintiffs in error who employed an attorney for the express purpose of examining the records and advising them as to their rights. It would be difficult to find a case that would hold to the contrary.

The general proposition stated with reference to estoppel in plaintiffs' in error brief, quoting from *Bank of U. S. vs. Lee,* vc *Peters Merchants Bank vs. State Bank,* 10 *Wall., and Kirk vs. Hamilton,* 102 *U. S.,* is not dissented from by the defendants in error in this case, but they have no application to the facts in this case, as we will show, and there are controlling authorities of this court directly applicable to the state of facts in this case.

The case of *Insurance Co. vs. Mowry,* 96 *U. S.,*

in stating the doctrine of estoppel with reference to abandonment of existing rights, expressly says, with reference to conduct or declaration:

"They would have that effect, if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had *designedly* induced another to change his conduct, or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment."

Insurance Co. vs. Mowry, 96 U. S. 548.

There is no such evidence here. On the contrary Heiniman and Crary both testify that they did not inform Dye that they were relying upon his statements, either in the development of the mine or in the payment of the $1500 purchase money.

In the case of *Morgan vs. R. R. Co.*, from the same volume, it is said, quoting from 10 Wall.:

"He is not permitted to deny a state of things which by his culpable silence or misrepresentation he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault upon the other, and some defect of which it would be inequitable for the party whom the doctrine is asserted to take advantage. Merchants' Bank vs. State Bank, 10 Wall. 604."

Morgan vs. R. R. Co. 96 U. S. 720.

The silence must be culpable and there must be a duty owed or what would amount to a fraud.

Plaintiffs in error lay great stress upon the case of Dickerson vs. Colgrove, 100 U. S. 578. Every case must be read in the light of the facts to which the principles are applied. The common source of title in this case was the ancestor, Micajah Chauncey. Edmund Chauncey, a son and heir of the ancestor, mov-

ed to California. The other child and her husband had conveyed the entire interest to Morton. The latter learned of the fact that Edmund was in California. Morton procured a letter to be written to Edmund to learn whether he claimed any interest in the property. Edmund writes to his sister as follows:

"Mr. Morton wrote me a letter. He wanted to know if I intended to claim any of the Conger farm." (Meaning the premises in controversy). "You can tell Mr. Morton for me, he need not fear anything from me. Thank God, I am well off here and you can claim all there. This letter will be enough for him. I intended to give you and yours all my property there, and more if you need it."

The court, after quoting this, says:

"The phase, 'I intended to give,' etc., implies that he knew his half of the farm had already been sold to Morton, and that he could not, therefore, give his sister, to whom the letter was addressed, any part of that property. It does not appear that there was any other property held by them as coparceners. He says further, that he intended to give her more if she needed it. Al lthis was communicated to Lowell Morton. What was the effect upon him? He was lulled into security. He took no measures to perfect his title, nor to procure any redress from the Klines, who had conveyed and been paid for the whole of the property while they owned but the half. On the contrary, he gave thereafter deeds of warranty to all the defendants—who are sixty-two in number—and he and they occupied and improved the premises down to the commencement of this suit. Between that time and the date of the letter was a period of nearly seventeen years. What improvements had been made and how far the property had risen in value are not disclosed, nor does it appear what stimulated Chaun-

cey to violate his promise and commence this attack on the defendants."

Dickerson vs. Colgrove, 100 U. S. 580.

The very statement of these facts and the application made by the court of the principle of estoppel shows that this case comes within the principles quoted from Pomeroy. 1st: He was apprised of the true state of the title. 2nd: He made the statement in the letter with the express intention to deceive, or with such culpable negligence as to amount to a fraud. 3rd: That Morton relied upon this declaration and was lulled into security—made sixty-two warranty deeds on the strength of it; extensive improvements were made upon the property, and no attempt at repudiation of the declaration was made for seventeen years. The very statement of the facts show that it has no application here, while *Brant vs. Virginia Coal & Iron Co., 93 U. S. 335 (infra)*—is absolutely conclusive against plaintiffs in error.

The doctrine of estoppel by conduct, silence or declaration, is laid down in Bigelow as follows:

"The cases when carefully analyzed show that all of the following elements must actually or presumably be present in order to an estoppel by conduct:

1. There must have been a false representation or concealment of *material* facts.

2. The representation must have been made with *knowledge* of the facts.

3. The party to whom it was made must have been *ignorant* of the truth of the matter.

4. It must have been made with the *intention* that the other party would act upon it.

5. The other party must have been *induced to act upon it.*"

Bigelow on Estoppel, page 484.

Neither one of the five propositions which this author says must concur before any such estoppel arises exists in this case. There was no false representation ,nor was there a concealment of any material fact known to Dye. 2nd. The representation must have been made with knowledge of the fact. There is not a scintilla of evidence here to show that Dye had any knowledge of the fact. He testifies positively when he first acquired knowledge, and it was long after the declarations were made as shown by the record, and it is not denied. 3rd. The party to whom it was made must have been ignorant of the truth of the matter. The parties here were not ignorant of the truth of the mater, because they employed an attorney to look up the title and were effeced with notice of everything of record, and had equal means of knowledge with Dye. 4th. It must have been made with the intention that the other party should act upon it. No such declaration was made to Dye. On the contrary, Heiniman and Crary both testified that they did not tell him that they were relying upon his declarations or upon his act. 5th. The other party must have been induced to act upon it. They had no right to rely upon Dye's silence or even his statements in answer to their questions, with the record open to them.

This author discusses each one of these proposition. With reference to the question of representation or concealment, he says: that such representation must relate to the past or present, for if it relates to something in the future—that is, Dye's intention—it must generally be either a mere statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract with the peculiar consequences of a contract. Quoting, *Jackson vs. Allen*, 120 *Mass.* 64. Now there was no contract-

ual relation whatever between either Dye and Taliaferro or Heiniman and Crary. We quote the language of the author:

"The representation or concealment must, like a recital, also in all ordinary cases have reference to a present or past state of things; for if a party make a representation concerning something in the future it must generally be either a mere statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract with the peculiar consequences of a contract."

Bigelow on Estoppel, page 486.

In the case of Jackson vs. Allen, it is said:

"Mere disappointment in expectation, or breach of promise or covenant relating to the future, cannot constitute an estoppel *in pais.*" Citing,

Langdon vs. Doud, 10 Allen 433.

Jorden vs. Money, 5 H. L. Cas. 185.

In the case of Langdon vs. Doud, supra, it is said, where a party stated he was going to leave the city and take up his domicile in another state.

"Such a representation is sometimes, though not very accurately, said to operate as an estoppel; but its effect is rather to shut out a party from offering evidence in a court of justice, contrary to his previous statements. Howard vs. Hudson, 2 El. & Bl. 1. Audenried vs. Betteley, 5 Allen, 382. Plumer vs. Lord, 9 Allen 455."

"But in the next place, it was a representation only of a present intention or purpose. It was not a statement of fact or state of things actually existing, or past and executed, on which a party might reasonably rely as fixed and certain, and by which he might properly be guided in his conduct, and induced to change his position in the manner alleged by the plaintiff. The intent of a party, however positive

and fixed, concerning his future action, is necessarily uncertain as to its fulfillment, and must depend on contingencies and be subject to be changed and modified by subsequent events and circumstances."

Langdon vs. Doud, 10 Allen 345.

This doctrine is stated in 2 Pomeroy's Eq. Jur., 806, substantially to the same effect as in Bigelow, especially with reference to the proposition as to when the owner of land is precluded by his conduct from settling up his legal title, and the author adopts the declaration of the principle made by Justice Field in the case of Boggs vs. Merced Min. Co. 14 Calif. 279. Mr. Pomeroy summarizes the statement as follows:

"I cannot better state this theory than in the language of an eminent and able judge, which has frequently been adopted as being an accurate exposition of the general doctrine. In order to estop a party by his conduct, admissions, or declarations, the following are essential requisities: It must appear —1. That the party making his admission by his declaration or conduct was apprised of the true state of his own title. 2. That he made the admission *with the express intention to deceive,* or with such careless or culpable negligence *as to amount to constructive fraud.* 3. That the other party was not only destitute of all knowledge of the true state of the title, but of all means of acquiring such knowledge. 4. That he relied directly upon such admission, and will be injured by allowing its truth to be disproved."

2 Pom. Eq. Jur., Sec. 806; 3rd Ed., page 1430.

We call special attention to the note, under this section and to this case.

We will not further review the cases cited by plaintiffs in error in their brief.

XII.

The Facts in This Case Furnish No Basis for Application of the Doctrine of Estoppel.

The title was of record, and defendants Crary and Heiniman had it examined by their attorney, Lund. The declarations made by Dye to other persons were not repeated to Crary and Heiniman, and are not shown to have influenced their action. Taliaferro has since become the owner of the property, and his co-owners have acquired title with full knowledge of the facts. Dye declared positively that he had no knowledge of the defects in the attachment suit, until long after the declarations upon which the claim of estoppel is based. See statement of the case above.

Estoppel would not be available for Heiniman and Crary, to say nothing of the other defendants. In Brant vs. Virginia Coal & Iron Co., 93 U. S. 335, it is said:

"It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury." "In all this class of cases," says Story, "the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect, implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief It has accordingly been laid down by a very learned judge that the cases on this subject go to show this result only, that there must be positive fraud or con-

cealment, or negligence so gross as to amount to constructive fraud." 1 Story's Eq. 391. To the same purport is the language of the adjudged cases. Thus it is said by the Supreme Court of Pennsylvania that "the primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped or in the effect of the evidence which he attempts to set up."

Hill vs. Eppley, 31 Penn. St. 334.
Henshaw vs. Bissell, 18 Wall. 271.
Biddle Boggs vs. Merced Mining Co., 14 Cal. 368.
Davis vs. Davis, 26 Id. 23.
Commonwealth vs. Moltz, 10 Barr, 531.
Copeland vs. Copeland, 28 Me. 639.
Delaplaine vs. Hitchcock, 6 Hill, 616.
Davis vs. Merchant, 1 Curt. C. C. 136.
Zuchtmann vs. Roberts, 109 Mass. 53.

"And it would seem that to the enforcement of an estoppel of this character with respect to the title of the property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established.

"There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct, in which the presence of fraud, actual or constructive, is wanting as where one of two innocent parties must suffer from the negligence of another, he through whose agency the negligence was occasioned will be

held to bear the loss; and where one has received the fruits of a transaction, he is not permitted to deny its validity whilst retaining its benefits. But such cases are generally referable to other principles than that of equitable estoppel, although the same result is produced; thus the first case here mentioned is the affixing of liability upon the party who from negligence indirectly occasioned the injury, and the second is the application of the doctrine of ratification or election. Be this as it may, the general ground of the application of the principle of equitable estoppel is as we have stated.

"It is also essential for the application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient or available means of acquiring such knowledge. When the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. Crest. vs. Jacks, 3 Watts. 240; Knouff vs. Thompson, 4 Harris, 361."

Brant vs. Virginia Coal & Iron Co., et al.,
93 U. S., pages 335 and 336.

The application of what is last above said, *"where the condition of title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel,"* completly removes the question of estoppel in this case.

We also call especial attention to Hobbs vs. McLean, 117 U. S. 581. The party claiming the benefit of an estoppel in that case, upon the ground that he had been misled by the sworn testimony of the other party, and thereby induced to spend money, the Court held there was no estoppel raised.

In Strum vs. Baker, 150 U. S. 336, it is said that an expression of an opinion does not work estoppel. We quote:

"This language did not mislead or induce either of the defendants or the insurance companies to alter or change their position in any respect whatever, nor influence their conduct in any way. Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complainant said in his testimony was a statement of opinion upon a question of law where the facts were equally well know to both parties. Such statements of opinion do not operate as an estoppel. If he had said, in express terms, that by that contract he was responsible for the loss, it would have been, under the circumstances, only the expression of an opinion as to the law of the contract, and not a declaration or admission of a fact, such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument."

"In Brant vs. Virginia Coal & Iron Co., 93 U. S. 326, 337, it was said: 'Where the condition of the title is known to both parties or both have the same means of ascertaining the truth, there can be no estoppel.'"

"So in Brewster vs. Striker, 2 N. Y. 19, and Norton vs. Coons, 6 N. Y. 209, 218, where it was ruled, 'that the assertion of a legal conclusion, where the facts were all stated, did not operate as an estoppel upon the party making such ascertion.'"

"In Bigelow on Estoppel, Sec. 2, pp. 572, 573, 5th Ed. it is properly said: 'The rule we apprehend to be this: that where the statement or conduct is not resolvable into a statement of fact, as disinguished from a statement of opinion or of law, and does not

amount to a contract, the party making it is not bound, unless he was guilty of clear moral fraud, or unless he stood in a relation of confidence towards him to whom it was made. If the statement, not being contracted to be true, is understood to be opinion, or a conclusion of law, from a comparison of facts, propositions or the like, and a fortiori, if it is the declaration of a supposed rule of law, the parties may, with the qualification stated in the last sentence, allege its incorrectness.'" And again, Sec. 2, page 571: "A representation in pais in writing, when of a part of a deed or made the subject of a contract, though on oath is no more efficacious so far as the question of estoppel is concerned, than a verbal statement."

Sturm vs. Boker, 150 U. S. pp. 335, 336 and 337.

See also as to equal means of acquiring knowledge of title.

Sloan vs. Chambers, 48 Mich. 359, 12 N. W. 488, holds party not estopped by statement that he had no interest in the land. Slaton vs. Bryant 55 Miss.; Kingman vs. Graham, 51 Wis. 217, 8 N. W. 187, all holding no estoppel by silence when title was on record. Mueller vs. Kaessman, 84 Mo. 329, where party could have obtained knowledge from the records; Clark vs. Parsons (N. H.), 39 Atl. 900, holding one making improvements could not claim estoppel when true title was of record.

Bank vs. Bank, 83 Fed. Rep. 737.
Simplat vs. Ry. Co. 16 Fed. 363.
Willson vs. McGehee, 13 S. E. 86 (Ga.)

XIII.

The plaintiffs in error have said something about the doctrine of election, but they fail to point out what

election Dye made until he brought this suit. They fail to show when he was called upon to elect. If a creditor proceeds to sell his debtor's property without the court having jurisdiction and no title passes in a suit at law the debtor's rights to recover his property in ejectment cannot be cut off short of the statute of limitations and no authority can be shown for any such proposition. This would be true if the property was purchased by the creditor or by a third person. And it is absurd to say that the statute referred to in brief of plaintiffs in error, Sub-section 137 of Section 2685 of Compiled Laws of N. M., 1897, providing that judgments may be set aside for irregularity on motion filed at any time within one year after the rendition thereof, required Dye to bring a suit to set aside a judgment which was absolutely void and open to collateral attack.

This estoppel cannot be made to operate for the benefit of the plaintiffs in error who purchased from Heiniman and Crary *after this suit was brought,* Heiniman and Crary having parted with all their interests and the judgment is not against them.

In 51 Federal Reporter, quoting from Brant vs. Iron Co. 93 U. S., and Morgan vs. R. R. Co. 96, U. S., it is said:

"The doctrine of estoppel alawys presupposes error without negligence on one side, and gross negligence or fraud upon the other, and that it would be inequitable for the party against whom it is asserted to take the advantage. Brant vs. Iron Co. 93 U. S. 326; Morgan vs. Railroad Co., 96 U. S. 716. The representations or information that defendant made or gave were not untrue or misleading and his silence, when under not duty or obligation to speak cannot possibly constitute an estoppel, even if the suit was against

him as an individual. No authority cited establishes an estoppel under such conditions.

"But aside from this the estoppel set up was one in favor of the importers, John Shillito & Co. 'An appeal *in pais* does not operate in favor of anybody. It operates only in favor of a person who has been mislead to his injury, and he only can set it up.' Ketchum vs. Duncan, 96 U. S. 666."

John Shillito & Co., vs. M'Clung, 51 *Fed* 876.

In Ketchum vs. Duncan, quoted from in the last case, in addition to what was there quoted, the court applying that doctrine, said: "So far as it appears, no one of the Appellants' was mislead, "and held that there was no estoppel. This applies exactly to the state of facts in this case.

InDeery vs. Cray, it is said:

"No person can rely upon estoppel growing out of a transaction to which he was not a party nor a privy, and which in no manner touches his rights. There is no mutuality, which is a requisite of all estoppels."

Deery vs. Cray, 5 *Wall*,, 803.

Again we quote authorities upon the proposition that parties making declarations must know that the party to whom they are made means to be guided by them.

Houser vs. Austin, 2 Idaho 190; 10 Pac. 44.

Pearce vs. Hardin, 54 N. W. 906; 95 Mich. 360; and cases cited.

Pearce vs. Andrews, 6 Cuch. 4.

Folrain vs. Collins, 3 Mass. 328.

Jameson vs. Rixey, 94 Va. 64; 64 Am. St. Rep. 726; 26 S. E. 863.

Stell vs. Smelting Co., 106 U. S. 456.

XIV.

FORFEITURE.

The plaintiffs in error treat all the matter of the alleged forfeiture and failure to do assessment work under the head of estoppel. There is not a single element of either estoppel or abandonment in them.

The objections made to the admission of the notice of forfeiture, above quoted from the record, were good, and the Court was right in finally sustaining the objections on the motion to strike out, and instruct the jury to find a verdict for the defendants in error.

It is plain that this alleged forfeiture could not operate in favor of Johns, for the reason that Taliferro paid Walsh as the agent for the Apex Mining Company, for the amount due from Dye, on account of this assessment—unquestionably in order to prevent a forfeiture to Johns. At the time this payment was made Taliferro was in possession, claiming title under the sheriff's deed, as the successor of Dye. He did not claim through Johns, and a forfeiture could only enure to Johns, a co-owner of Dye's. It could not enure to him because he was paid; and Taliaferro cannot set up an outstanding title in a stranger to defeat Dye's title under which he entered into possession. Dye's title was not divested by sheriff's sale, and would not have been so divested if the sale had been valid.

The well known case of *Turner vs. Sawyer*, 150 U. S. 578, is absolute authority for these propositions. It decides.

"It will be observed that the right to give this notice of forfeiture for contribution is limited to a co-owner who has performed labor. Turner was not a co-owner of Sawyer at any time during 1884, etc."

Turner, like Taliaferro, was a purchaser at sheriff's sale, but was not entitled to his deed until the year for redemption had expired. Turner was also the assignee of certain other judgments which had been recovered against the execution defendants, whose interests had been sold. The Court says:

"Neither of these," (the sheriff's certificate of sale or the assignments of judgments) "however, made him a co-owner during the year 1884, within the meaning of the statute, which providing as it does for the forfeiture of the rights of a co-owner should be strictly construed. Indeed by the laws of Colorado title to land sold under execution in the judgment debtor until the deed is executed."

Turner vs. Sawyer, 150 U. S. 584.

Dye had a right to pay his proportion of this assessment at any time until forfeiture was complete under the statute. This forfeiture was not complete, and in February, Taliaferro entered into possession. If there had been any forfeiture it was waived in June by the acceptance of the money from Taliaferro. See receipt, *trans. page* 175.

2 Lindley on Mines, Sec. 646.

No authority is necessary for this proposition. The statute itself is sufficient. The notice warns the delinquent to pay within ninety days. The language is "If at the expiration of the ninety days such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest shall become the property of the co-owners who have made the expenditure." Under this condition of things Taliaferro entered into possession in February, claiming to own Dye's interest under the sheriff deed. The ninety days did not expire until April. The possession of the agents of Johns, the Apex Mining Company, or Walsh, was also the possession of Dye, until

the forfeiture was complete. Taliaferro testifies that he entered into possession in February.

Union Con. S. M. Co. vs. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 323.

Colman vs. Clements, 23 Cal. 245; 5 Mor. Min. Rep. 247.

Mallet vs. Uncle Sam Co., 1 Nev. 188; 1 Mor. Min. Rep. 17.

The forfeiture could be waived and was waived by the acceptance of the money from Taliaferro in June. The rights accruing under the forfeiture could be abandoned. The acceptance of the money after the forfeiture would amount to waiver.

Black vs. Elkhorn Min. Co. 163 U. S. 451.

Forfeitures are not favored. All the authorities hold this. This applies to mining claims. This statute is strictly construed as already shown by authorities and the doctrine of forfeiture as applied to mining claims is not at all different from a forfeiture under the terms of a lease. The receipt of rent after forfeiture or even notice of forfeiture waives the forfeiture.

Doe on the Demise of Bryan vs. Bancks, 4 B. & A. 401, Kings Bench 1821; 6 Mor. Min. Rep. 278.

See especially,

Waring vs. Crow, 11 Cal. 366; 5 Mor. Min. Rep. 204.

Wiseman vs. McNulty, 25 Cal. 230; 6 Mor. Min. Rep. 326.

But the payment on the fifteenth of June of the amount due on account of the assessment work done by Taliaferro and acceptance by Walsh, without any agreement to subrogate Taliaferro to the rights of Johns, was a voluntary payment on the part of Taliaferro, which extinguished the indebtedness and its

acceptance certainly put an end to any forfeiture that might have been claimed by Johns, could he have claimed such. And therefore it is only as between Johns or his representatives or persons claiming under him by deed that the question can be raised as to whether the plaintiff Dye accepted the benefit of such payment or not. At the time that Taliaferro entered into possession he had a right to make the payment himself and anything he did after he entered into possession of the property would be hostile to Dye, just as the doing of the assessment work when he was holding the property in hostility to Dye.

See Crumlish's Admin. vs. Central Improvement Co., 39 W. Va. 390 reported in 23 L. R. A., with long note, p. 123.

In 43 Federal Repartee, page 166, it is said:

"In determining the question raised by the exception it must be conceded that payment by a mere stranger confers no right of subrogation. As declared in the authorities, the rule is not, however, limited to payments by a surety, but will apply in every instance (except in the case of a mere stranger), when one man has paid a debt for which another is primarily liable.' Bish. Eq. Sec. 337."

The Jersey City, 43 Fed. 167.

It is clear that this payment was not made for and on account of Dye but for the benefit of Taliaferro himself and no ratification of it can be inferred.

The agreement which Dye testified Johns made with him in Denver, to see that the assessment work was done on the claim, which is absolutely not denied, precludes and prevents the operation of this notice to work a forfeiture of Dye's interests in the claim. We have elsewhere set out this testimony in full. (See statement of case.)

The first question to be determined is whether

Dye was a delinquent co-owner. Undisputed testimony must be taken as true. If Johns agreed to do the work for him his rights certainly could not be forfeited without a demand on him for payment before the notice was published. The publication only gave constructive notice. This statute is to be strictly construed and strict proof required.

Turner vs. Sawyer, 150 U. S. 585.

Brundy vs. Mayfield, 15 Mont.; 38 Pac. 1067.

Royston vs. Miller, 76 Fed. 51.

Justice vs. Bradley, 82 Fed. 555.

"We would not be justified in dogmatically asserting that this process of advertising a co-owner out is clearly unconstitutional. But we think we may safely assert that whenever the law is invoked the Courts will demand strict proof of the fact of delinquency, and of the full and fair compliance with each requirement of the law. The burden of proof rests with the party asserting the forfeiture."

2 Lindley on Mines, Sec. 646, page 1211; citing Saunders vs. McKay, 5 Mont. 523; 6 Pac. 361.

No one could contend that if a co-owner made a contract with a stranger to do his assessment work and it was done, that his interest could be forfeited. If his co-owner agrees to have it done for him, or on his account, it is no more liable to forfeiture, for failure to pay for it, than if done by a stranger.

The principle which absolutely determines the rights of the defendants in error in this case is, that Taliaferro and those claiming under him can not set up an outstanding title in another. They purchased no title and took no title by the mere payment of this money, from Johns, and entered and held under the sheriff's deed in privity with the defendants in error

in this case, otherwise they are mere naked trespassers and cannot set up an outstanding title.

Sedgwick and Wait on Trial of Title to Land, Secs. 58, 477 and 718 quoting Christy vs. Scott, 14 How. 282, where it is said:

"A mere intruder cannot enter on a person actually seized, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title. He may do so by writ of entry, where that remedy is still practiced, or by an ejectment, or he may maintain trespass."

Burt vs. Panjaud, 99 U. S. 180.

Christy vs. Scott was approved in Haws, vs. Victoria Copper Mining Co., 160 U. S. 317; making the quotation above set out from Sedgwich and Wait, and citing numerous other authorities in support of the proposition, including:

Campbell vs. Rankin, 99 U. S. 261.
Atherton vs. Fowler, 96 U. S. 513.
Belk vs. Meagher, 104 U. S. 279.
Glacier Mining Co. vs. Willis, 127 U. S. 471.

All these are mining cases.

All that is necessary to be shown is that the work was done up to the time of the entry by Taliaferro and the plaintiffs in error claiming under lien. This was amply shown.

Hammer vs. Garfield, 130 U. S. 293.
2 Lindley on Mines, Secs, 645-6.

N. M. etc. R. R. Co. vs. Crouch, 4 N. M. 293.

See, Roses Notes to Christy vs. Scott, Vol. 5, page 249.

Belk vs. Meagher, 104 U. S. 279.

Where claim is wrongfully held by another, owner is excused from doing work.

Erhart vs. Board, 113, U. S. 963. Same case, 8 Fed. 693.

Slavonia Mining Co. vs. Peraside, 7 Fed. Rep. 337.

Trevaskis vs. Peard, 44 Pac. 246. (Cal.)

Mills vs. Fletcher, 34 Pacific, 637 (Cal.)

Utah Min. & M. Co. vs. Dickert, 21 Pac. 1002.

Robinson vs. Imperial S. & M. Co., 5 Nev. 44.

The proof not only shows the adverse possession in this case but the plea under our statute admits it

"To entitle the plaintiff to recover in an action of ejectment, it shall not be necessary for the plaintiff to prove that at the time of the commencement of the action the defendant was in possession of the premises claimed, but the fact of such possession shall be taken as admitted by the defendant upon his filing a plea of not guilty."

Sec. 3166 Com. Laws N. M. 1897.

The defendant Taliaferro (plaintiff in error here) entered under the plaintiff's title and in subserviency to it and being a purchaser at a sheriff's sale the relation is of vendor and vendee and he cannot be heard to dispute the plaintiff's title; but the deed being ineffective to convey title, the plaintiffs (defendants in error here) are entitled to recover.

See Mickey vs. Stratton, Federal Cases No. 9530, where it is said:

"But it appears from the evidence that Shiel was in possession of the premises under this deed until the conveyance by the sheriff to Parish, under which the defendant entered. Possession is always prima facie evidence of title and proof of prior possession is sufficient to maintain ejectment against a mere trespasser. Tyler, Ej., 73 Day vs. Alverson, 9 Wend. 233; Hutchinson vs. Perley, 4 Cal. 34; Hicks vs. Davis, Id., 69 Winans vs. Christy, Id., 78; Bequette vs. Caulfield, Id. 278 Marshal vs. Shater, 32 Cal. 149; Turner vs. Aldridge (Case No. 14,249); Christy vs. Scott, 14 How. (55 U. S.) 290; Jones vs. Easley, 53 Ga. 455; Oregon Cascades R. Co. vs. Oregon Steam Co., 3 Or. 178; Eagle Woolen Mills Co. vs. Monteith, 2 Or. 282.

"The deed from the sheriff to Willis is claimed to be invalid, and unless it is found to be sufficient the defendant is in as a mere trespasser and the plaintiff must prevail in this action upon the prior possession of his grantor, Shiel, without reference to the validity of the deed from university to the latter."

"But there is another and conclusive answer to this objection. The plaintiff and defendant both claim under Shiel, and it is not necessary for either to prove title farther back than him. The defendant sets up an estate in fee in Willis in the premises, to defeat a recovery by the plaintiff i nthis action, and if he has any interest therein upon the evidence, it is derived from Shiel by means of the sheriff's sale and deed. The plaintiff claims under Shiel also, by a conveyance subsequent to that of the sheriff. Neither is therefore at liberty to deny Shiel's title at the time of the sheriff's sale. In Gaines vs. New Orleans, 6 Wall. (73 U. S.) 715, the Supreme Court says: 'The defendants, equally with the complainant, claim title from the same common source. This is clear from the pleadings

and the proof, If, therefore, both parties claim title from the same person, neither is at liberty to deny that such person had title. '

"This rule is also maintained in Eagle Woolen Mills Co. vs. Monteith, 2 Or. 282; Brown vs. Brown 45 Mo. 414;; Fellows vs. Wise, 49 Mo. 352;; Butcher vs. Rogers, 60 Mo. 140; Ames vs. Beckley, 48 Vt. 395; 2 Greenl. Ev. Sec. 397. Greenleaf, supra, says: "Where both parties claim under the same third person it is sufficient to prove the derivation of title from him, without his title.' "

Mickey vs. Stratton, 5 Sawy. 475; Fed. Case No. 9530.

The common source of title here was the location under which Dye claimed title to five-sixths of the property.

In Cooper vs. Galbraith, it is said.

"In the first place, it is clear, that this defense would have been inadmissable, upon the principle, that a man cannot recover in ejectment, nor defend himself against his own covenant or grant. He is estopped by his own act, from saying that his title was defective, when his deed professes to pass a good title Upon a similar principle, a man will not be permitted against his own act, though not by deed, to controvert the title which he has thus acknowledged as if one man came into possession of land, by permission of another, he thereby admits the title of that other and, in ejectment to recover back the possession he cannot question it."

Cooper vs. Galbraith, 3 Wash. C. C. 546; Fed. Case No. 3193.

In other words, Taliaferro entered into the possession of this land under a sheriff's deed purporting to convey him the title Dye had and Dye's title had not been forfeited at the time that he entered, and,

in the language of this case, he thereby admits the title of Dye and in ejectment to recover back the possession he cannot question it.

See also, 29 A & E. Ency. of Law. 706.

Galloway vs. Finley, 12 Peters, 395-6.

In the latter case it is said, "Acts done by vendee to perfect title, while in possession, inure to the benefit of him under whom possession was obtained." This applies directly to the payment of the money for the assessment work in 1898. See,

3 Roses Notes to this case, page 733.

Resort must be had to equity for reimbursement.

In Wilison vs. Watkins, it is said that a tenant cannot deny his landlord's title. The opinion then says:

"The same principle applies to mortgagor and mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another by a recognition of his title. On all these subjects the law is too well settled to require illustration or reasoning, or admit of a doubt."

Willison vs. Watkins, 3 Peters 48.

See also, Duke vs. Harper, 6 Yerger 285 27 Am. Dec. 220; where entry was made under parol lease, void under the Statute of Frauds.

Hagar vs. Wykoff (Okl.), 39 Pac. 281; *a case as to public lands.*

In 10 New York, where entry was made under a void sheriff's deed, the Court said:

"I have not been able, however, to discover upon what principle the defendants can be permitted to raise this question of E. Kane's title. The most that can be claimed for them is, that by virtue of the sheriff's sale and deed on that decree they acquired the title of Kane; and they stand in no better position than he did, and, being estopped, cannot deny Kane's

title. (15 Wend. 607; 3 Peters, 47; 19 Pick. 341; 4 Adol. & Ellis, 782, 809; 2 Smith's 1 C. 540; 2 Barn. & Adol. 278; Powell on Mortgages 221, 1074, 1075; Cowp. 601)."

Peck vs. Mallams, 10 N. Y. 545.

In 7 Federal Reporter, it is said:

"The character of one's possession of land is determine by that of his entry, unless he has given the party holding the title under which he entered, notice of his intention not to hold under that title, or unless there has been a legal eviction, and possession taken or continued under a paramount title. Quinn vs. Quinn, 27 Wis. 168. One who enters under a contract of purchase is estopped from denying the title of his vendor so long as he retains possession under the contract. Miller vs. Larson, 17 Wis. 644; Quinn vs. supra; Jackson ex dem vs. Walker, 7 Cowen, 637. A party in possession of lands, recognizing the title of a claimant, and agreeing to purchase may subsequently deny such title, set up title himself, and show that this acknowledgement was produced by imposition or made under a misapprehension of his rights; but a party *entering into* possession under an agreement to purchase cannot dispute the title of him under whom he enters until after a surrender of the possession. Jackson ex dem vs. Spear, 7 Wend. 40 L."

Heermans vs. Schmaltz, 7 Fed. 576.

In 11 A. & E. Ency. of Law, 441, it is said:

"Nor can the grantee, in a contest with another, whilst relying solely upon the title conveyed to him, question its validity when set up by the latter; in other words, he cannot assert that the title obtained from his grantor or through him is sufficient for his protection and not available to his contestant. Accordingly, where both parties assert title from a common grantor and no other source, neither can deny that such grant-

or had a valid title when he executed his conveyance."

And the abundant citation of authorities, in addition to those above cited, which it is not necessary to cite.

XV.

The plaintiffs in error insist upon the doctrine of subrogation and claim some rights under Section 3126 of the Compiled Laws, 1897. It would seem to be too plain for argument that the provisions of that section could only apply to a valid judicial sale or a valid sale under execution. The section is as follows:

"When any property shall be sold subject to liens and encumbrances, the purchaser may pay the liens and encumbrances, and hold the property discharged from all claims of the defendant in execution; but the defendant may redeem the property within one year after the sale thereof, paying to the purchaser, his heirs or assigns, the purchase money, with interest; when redeemed, the purchaser shall have the growing crops, and shall not be responsible for rents and profits, but he shall account for wastes."

Section 3126 Compiled Laws of 1897.

This section cannot have the slightest application to a purchaser under a void execution sale. When he goes into possession he is a mere trespasser without title. A discussion of the doctrine of subrogation shows the same thing and the purport of the section.

One of the strongest cases against the contention of plaintiffs in error that can be found is the case of Aetna Life Insurance Company vs. Middleport, 124 United States 534. Not only is the doctrine of subrogation restricted to courts of equity in an equitable proceeding which enables the party invoking the doctrine to recover any money which he has paid out, but it is never enforced in favor of a volunteer. When Talia-

ferro in this case paid for the annual labor done the year before he entered into possession he was simply a volunteer. In the case cited, it is said:

"The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own."

Aetna Life Insurance Co. vs. Middleport, 124 U. S. 549.

We also quote as follows:

"In *Gadsden vs. Brown,* Speer's Ep. (So. Car.) 37, 41, Chancellor Johnson says: 'The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature never could have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, as far as I have been able to learn its history, it never has been so applied. If one with the perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, and rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not but choose to abide the penalty."

Id., page 549.

This case, however, clearly shows that any claim which Walsh may have had on account of the doing of the work during the previous year was extinguished. We quote as follows:

"Chancellor Walworth, in the case of *Sanford*

vs. McLean, 3 Paige, 122, said: 'It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course without any agreement to that effect. In other cases the demand of a creditor which is paid with the money of a third person and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person is absolutely extinguished.' "

Id. page 550.

This whole case is a most instructive case on the doctrine of subrogation that can be found. It is not necessary to quote further from it.

We also cite the case of *German Savings and Loan Soc. vs. De Lashmutt*, 67 Fed. Rep. 399; where a deed of conveyance was void, that as to any payment of money to remove liens from the property, the doctrine of subrogation does not apply.

We especially call the attention of the court to the case *of Meyer vs. Mintonye*, 106 *Ill.*, which is exactly like the case under consideration. Then there was a void judicial sale and a suit was brought by the party claiming that the sale was void, and it was distinctly held that the doctrine of subrogation had no application to a suit at law and could not be applied. In that case there was a redemption from a prior valid sale and it was attempted to be set up as a defense in a suit in ejectment. It, too, shows that the prior encumbrance was extinguished by the payment. We quote from the case as follows:

"The mere act of redeeming may always be done by one person as well as another, provided the creditor sees proper to accept the amount of the charge or incumbrance. For instance, if A should have a judg-

ment against B, which was a lien upon the latter's land, and C should, without the knowledge or privity of B, go to A and propose to pay off the judgment on his own account, A undoubtedly would have the right to decline the payment without at all affecting or prejudicing his lien upon the land; yet if he should accept the money, there can be no doubt but that the redemption of the land from the incumbrance would be complete. So in the present case, by reason of the execution being invalid, it is clear that there was no right to redeem, and Kramer might well have declined to receive the redemption money, had he thought proper to do so; but this right to decline the redemption money, when tendered, like most rights, was one that might be wavied, and Kramer having seen proper to exercise it, no reason is perceived why the redemption was not complete, notwithstanding appellant acquired no title by her subsequent purchase, as we have already seen. It does not at all follow that because a redemption in fact has been effected, the redeeming creditor will necessarily get a good title to the land redeemed. That depends upon other considerations. To insure a good title there must be not only the payment of the redemption money, but also a preper levy and sale of the premises, under a valid execution, followed by a sheriff's deed executed in conformity with the statute.

"So far, then, as the previous sale in this case is concerned, we hold the payment, and voluntary acceptance by Kramer of the redemption money, had precisely the same effect it would have had if the execution had been valid. The effect in either case would be to relieve the land of the incumbrance, the consequences of the previous sale, and to extinguish all rights under it, including the certificate of purchase. But this alone, as we have just seen, was not

sufficient to make appellant's title good under her purchase. It simply placed her in the same position with respect to the land as if it had not been previously sold. It removed every impediment out of the way of her execution, thereby enabling her to proceed with her execution in the same manner as if no previous sale had ever occurred. But this was all. The reception of the redemption money by Kramer did not at all relieve here from the duty of seeing the sue was proceeding under legal process. This must be looked to in all cases, whether there has been any redemption or not, otherwise there is no assurance of obtaining a good title. The maxim of *caveat emptor* applies as well in cases where there has been a redemption as where there has not.

"To the suggestion of hardship, so far as it affects the present proceeding, we see nothing to distinguish the case in this respect from the common case of one purchasing land at an administrator's sale, where, by reason of the non-observance of the statute regulating such sales, the purchaser acquires no title. Notwithstanding the purchase money in such case is applied to the payment of the ancestor's debts, for which the heir would be liable to the extent of assets received by him, he is nevertheless, by the rules of the common law, as long held by this and other courts of the highest respectatbility, permitted to recover the land without restoring the purchase money, or any part of it. These cases proceed upon the principle that the purchaser must know, at his peril, whether he gets good title. The enforcement of the rule tends to secure an observance of the law regulating such sales, and thus preventing abuses. Suits of this character are proceedings *in invitum*, for the purpose of divesting the title to an estate of one citizen and conferring it upon another, and this, under our constitu-

tion, can only be done by a strict compliance with the requirements of law, and the purchaser in all such cases must know, at his peril, that the law is complied with. If this is not done, of course he fails to get a good title, however much he may have paid for the preperty. On the other hand, if the law is observed, he acquires a good title to the estate, although he may not have paid one-fourth its value.

"To the suggestion that appellant ought, in some way, be subrogated to the rights of Kramer, which is not made very clear by the learned counsel, it is sufficient to say that the doctrine of subrogation is a creature of equity, and consequently can have no application to an action at law like the present. This suit is brought for the sole purpose of determining the legal title to a tract of land, and the equities of the parties, whether real or supposed, cannot be adjudged in it. If appellant has any equities which the law will enforce, which is a matter not before us now, they are not affected by this proceeding, and she must go into a court of chancery, where such matters are cognizable, for a court of law has no power or jurisdiction to pass upon them."

Meyer vs. Mintonye, 160 Ill. 421.

Thus it is distinctly shown, and every authority cited in brief of plaintiffs in error shows that subrogation is purely an equitable remedy.

Subrogation is never enforced at the expense of a legal right. A suit in ejectment is the assertion of purely a legal right under our statute, and necessarily so under Federal jurisprudence. In 27 American and English Ency. of Law, it is said, with reference to it:

"Nor will it be enforced at the expense of a legal right."

27 A. & E. Ency. of Law, p. 205, Note 1, and cases cited:

"An equitable title is no defense to an action of ejectment."

Singleton vs. Touchard, 1 Black 342; cited in Bouldin vs. Phelps, 12 Sawyer 315; 30 Fed. 561;

Lerma vs. Stevenson, 40 Fed. 359.

Both cases holding that in federal courts legal title prevails in ejectment. That is the doctrine of our own supreme court.

The doctrine of subrogation is more fully treated in *Pomeroy's Equitable Remedies, Volume 2, Supplementary to Pomeroy's Equity Jurisprudence, Volume 6* (Latest Edition).

See page 1499, treating of a case like the present. Now Dye has never consented in any way that the purchase money bid by Taliaferro should be applied to his debt, and it is said on *page* 1501 that "A mere volunteer, it is generally agreed, is never entitled to subrogation," and that it can never be claimed where the payment was made by a mistake of law. Citing,

Givins vs. Carroll, 42 Am. St. Rep. 889; 18 S. E. 1030;

Brown vs. Rouse, 125 Cal. 645; 58 Pac. 267; and other cases in notes.

In the note it is said:

"But the payment of a debt by a stranger should, it is submitted, operate as a discharge of the debt and a defense for the debtor only where ratified by the latter."

Id. page 1502.

See Section 912, Note 10.

In Section 922, it is also distinctly held that sub-

rogation is purely an equitable remedy and authorizes only the recovery of the money paid.

In 190 Illinois, it is said:

"Subrogation is an equitable right, and not a legal one, and can be enforced only in equity. It will not be enforced where it would be inequitable to do so, or where it would work injustice to others having equal equities."

Makeel vs. Hotchkiss, 190 Ill. 311; 83 Am. St. Rep. 131; 60 N. E. 524.

As to remedy being merely one for reimbursement, see

6 Pomeroy's Eq. Jur., page 1509; Note.

Steel vs. Smelting Co., is conclusive upon the proposition that the legal title must prevail.

"This is so well established, so completely embedded in the law of ejectment, that no one ought to be misled by any argument to the contrary."

Steel vs. Smelting Co., 106 U. S. 452.

This completely answers the contention about subrogation, as we have already shown:

"In actions of ejectment in the United States courts, the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the Federal courts."

Foster vs. Mora U. S. 428.

11 A. & E. Ency. of Law, 533, and cases cited, Note 2.

Ryan vs. Staples, 76 Fed. 721.

Young vs. Commissioners, 51 Fed. 585.

Davis vs. Davis, 72 Fed. 83.

In the latter case it is said:

"In Bagnell vs. Broderick, 13 Pet. 436, which was an action of ejectment, in which it was sought to set up equitable titles, the supreme court said:

" 'The equity side of the circuit court is the proper forum, and a bill the proper remedy, to investigate the equities of the parties.

"And that has been the rule, many times recognized, so that ,in Foster vs. Mora, 98 U. S. 425, 428, the court declared, not redeeming it necessary to cite authorities.

" 'In actions of ejectment, in the United States courts, the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the federal courts.'

"And see Landgon vs. Sherwood, 124 U. S. 74, 85, 8 Sup. Ct. 429."

Davis vs. Davis, 72 Fed. 83.

The proposition that equitable defenses can not be set up in ejectment is but the correlative of the proposition that the plaintiff must recover on his legal title, or its equivalent—prior peaceable possession, against one entering without title.

Bagnall vs. Broderick, 13 Peters 426.

XVI.

SHERIFF'S NOTICE OF SALE.

The sheriff's notice of sale did not comply with the statute and he should not have failed to appraise and sell the property levied on under the first writ.

The sheriff's notice of sale in no way complies with the statute. It does not set forth:

1st. The title of the cause.

2nd. It does not set forth the name of the action.

3rd. The date of the rendition of the judgment.

4th. The amount thereof, with interest thereon to date of sale.

5th. A sufficient identification of the property.

See Record, p. 81.

Compiled Laws of 1897, Sec. 3115.

The sheriff should have had all the lands levied upon, appraised and sold under the statute, and have sold only so much as was necessary to bring the amount of the debt. He could not select a part and sell.

Compiled Laws, Secs. 3119, 3123.

The sections of the Compiled Laws of New Mexico above referred to are as follows:

3115. "All notices of sale by the sheriffs under execution, order or decree of any district court in this territory shall contain as briefly as possible the style or title of the cause in which said judgment, order or decree was obtained, the nature of the action, the date of the rendition of said judgment, or the making of said order or decree, the amount thereof, with interest to date of sale, and the description of the property to be sold, sufficient for the complete identification thereof, together with a statement of the date, hour and conditions of said sale."

3119. "No real property shall be sold on any execution issued out of any court in any case at law for less than two-thirds of the appraised cash value thereof, exclusive of liens and incumbrances."

3120. "The sheriff between the days of levying the execution and the sale of the property, shall proceed to ascertain the cash value of such property as follows:

3121. "For that purpose two disinterested householders of the neighborhood where the levy is made shall be selected as appraisers, one of whom shall be selected by each of the parties or their agents,

or in the absence of either party or his agent, or upon the refusal of either party, after three days' notice by the sheriff to make the selection, the sheriff shall proceed to select the appraisers, who shall proceed to appraise the property according to its cash value at the time, deducting liens and encumbrances; and in case of their disagreement as to the value thereof, they shall select a like disinterested appraiser, and with his assistance shall complete the valuation, and the appraisement of any two of them shall be deemed the cash value.

3122. "In case any appraiser shall fail to act or to complete such valuation, another shall be chosen in his stead as above provided.

3123. 'The sheriff shall furnish the appraisers with a schedule of the property levied on with the incumbrances made known to him, and they shall proceed to fix, and set down opposite to each tract, lot or parcel of real estate, the cash value, deducting liens incumbrances, which schedule shall be returned to the sheriff.'

XVII.

THE SHERIFF'S DEED.

The sheriff's deed was ineffective to convey title.

A sheriff's deed executed before the period of redemption has expired is void.

Rorer on Judicial Sales, Sec. 956.

Graham vs. Wing, 10 Mich. 486.

Gross vs. Fowler, 21 Cal. 392.

"The deed having been executed before the expiration of the statutory period allowed for redemption, the question arises, whether it is void or only voidable. The plaintiff contends that it is only voidable—

which he means, as we suppose, that it is good until set aside by direct application to the court, and that it cannot be attached collaterally. If this be his meaning, the position is untenable. The real question is one of power. Had the sheriff authority to execute the deed at the time—and to this there can be but one answer. His power did not arise until the six months had elapsed."

Bernal vs. Glein, 33 Cal. 668.
Moore vs. Martin, 38 Cal. 428.

"The deed to Quivey from the sheriff, however, was void, because it was made before the expiration of six months after the sale, for which reason the sheriff had no power to make it. Gross vs. Fowler, 21 Ga. 392; Bernal vs. Gleim, 33 Cal. 668.)"

Hall vs. Yoell, 45 Cal. 587:

"The sheriff's deed which followed the sale under executon in the case of Schlesinger vs. Dionicio Berral, was executed within less than six months after the sale was made, and as has been frequently held by this court, was for that reason utterly void."

3 Freeman on Execution, Sec. 328. (3d Ed.)

What is necessary to be shown to support sheriff's deed.

Rorer on Judicial Sales, 794.
Wheaton vs. Saxton, 4 Wheaton, 503.
Cooper vs. Galbraith, 3 Wash. Cit. Ct. Rep. 546; 6 Fed Cases No. 193.
Mickel vs. Stratton, 17 Fed. ases, No. 9530.

The last two cases hold that there is a privity between the purchaser at sheriff's sale and the execution debtor. The relation is that of vendor and vendee.

"The deed from the sheriff, unless it is found to be sufficient, leaves the defendant a mere trespasser, and the plaintiff must prevail in the action upon prior

possession of his grantor, etc." Mickey vs. Stratton, 17 Fed. Cases, 9530.

We submit that the judgment of the Court below should be affirmed.

Respectfully Submitted,

W. B. CHILDERS,

Attorney for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 103.

H. C. CRARY ET AL., PLAINTIFFS IN ERROR,

vs.

BENJAMIN H. DYE AND WM. B. CHILDERS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

SUPPLEMENTAL AND REPLY BRIEF OF DEFENDANTS IN ERROR.

The plaintiffs in error having filed an additional and supplemental brief in this cause, defendants in error ask the permission of the court to file an additional brief in answer thereto, and to correct some errors in the original brief of defendants in error, which seems to need some explanation.

Counsel for defendants in error beg to apologize to the court for an inexcusable number of typographical errors in the original brief, and for numerous citations of decisions made from other than the official reports. The typographical errors are apparent and not misleading, although vexa-

tious. The other defect we will endeavor to correct by citing the official report herein.

I.

We first call attention of the court to what may properly be called an omission of facts shown by the record, which the plaintiffs in error claim they can avail themselves of, the effect of the attempted forfeiture of the interest of Dye for failure to contribute his share of the one hundred dollars' worth of work done on the claim in 1898.

The Supreme Court of the Territory in its opinion says that the title to the one-sixth interest on which this forfeiture was based was not in Johns, but in the Apex Gold Mining Company; that Johns was the manager of the company, but was a stranger to this title. A notice to Dye that Johns had performed the labor as co-owner with him was no notice; that the Apex Gold Mining Company, his real co-owner, was attempting to advertise him out (Turner *vs.* Sawyer, 150 U. S., 578). Walsh, who was in charge of the interests of the Apex Gold Mining Company, distinctly states that this company owned this interest, and that he did the work for the company (Record, pp. 173-4, folios 268-9; see testimony of Jones Taliaferro, p. 190, folio 293). It is true that Dye testified (Record, p. 234) that Johns purchased the Heman interest—this one-sixth—but he does not state whether he purchased it for himself or the Apex Gold Mining Company. No deed is in the record to show to whom it was conveyed. The money was paid by Taliaferro to Walsh for Johns, as shown by the receipt (Record, p. 175). Walsh testifies (Record, p. 175):

> "A. There was one hundred dollars' worth of work done.
>
> "Q. By whom?
>
> "A. By the Apex Gold Mining Company, with Johns as manager. * * *

"Q. Who paid the one hundred dollars out in the first instance?

"A. T. C. Johns, as manager of the company."

Record, p. 174, folio 268.

In the supplemental brief, page 7, plaintiffs in error attempt to throw upon defendants in error the burden of showing that Johns was the owner. As the Supreme Court of New Mexico holds "statutes of forfeiture are strictly construed and must be strictly complied with," it was incumbent upon the plaintiffs in error to prove every fact by competent evidence to establish this forfeiture, including Johns' ownership of this interest. We desire especially to call attention to what the court below said in paragraph 3, p. 277, of the record as to this claim of forfeiture in addition to the above. We do not mean to waive anything we have said in the original brief on this subject in calling special attention to what seems in itself to settle every contention made by plaintiffs in error as to this claim of forfeiture.

II.

In the supplemental brief filed by plaintiffs in error in this case it is said that section 2685—subsection 24, Comp. Laws of N. M., 1897—superseded sections 2701, 2955, and 2956 as to the publication of notice of pendency of suit in attachment cases. We have called attention to the fact that subsection 175 expressly excepted attachment suits from the operation of the Code of Civil Procedure, section 2685. Counsel attempts to draw some refined distinction between attachment proceedings and writs of attachment. Subsection following 179 conclusively shows that this is absolutely untenable. These sections are as follows:

Comp. Laws N. M. (1897):

"SUBSECTION 175. This act shall not apply to, or in any wise affect proceedings for *habeas corpus*, man-

damus, prohibition or *quo warranto*, and shall not affect actions of replevin or writs of attachment, except as to the form of the action.

* * * * * * *

"SUBSECTION 179. The former practice in law and equity shall be retained in all cases and proceedings not comprehended within the terms and intent of this code."

III.

Counsel for plaintiffs in error seems to entirely misunderstand the purpose for which Smith *vs.* Montoya, 3 N. M., is quoted. He seems to contend that because the garnishee took an appeal and reversed the judgment it was not void. A void judgment may be set aside on an appeal. The point is that the court acquired no jurisdiction of the defendants or of the debt which was the subject of garnishment—the *res*. The garnishee had to look to this after reversal. If no proper steps were taken to make proper publication, no valid judgment ever could have been rendered against the garnishee.

IV.

On pages 4 and 5 of the supplemental brief counsel for plaintiffs in error seems to confuse four things: abandonment, subrogation, estoppel, and the rights of a purchaser at judicial sale to pay off prior liens and incumbrances. The right to discharge prior liens and incumbrances must be based upon a purchase—a valid judicial sale. If the sale was valid, that itself settles this case. If it was not valid, Dye was under no obligations to either redeem or pay for his proportion of the annual work for 1898, so far as the plaintiffs in error are concerned. The payments by Taliaferro to the Apex Gold Mining Company were voluntary, and no rights can be predicated thereon even in equity. Subrogation, as already shown in the original brief, is not a subject

for consideration in an action of ejectment. As to estoppel, that must depend upon something subsequent to the alleged acquirement of title by Taliaferro and has been fully treated in the original brief.

V.

In the supplemental brief of plaintiffs in error there is some contention made that Dye did not testify that Johns did not make any demand on him for his share of the cost of the assessment work; that Dye admitted to two witnesses that he had lost his interest because of his failure to do the assessment work. A demand by Johns would not have changed the case in the least. Whether Dye was a lawyer or not does not change the rules of law. He may have been mistaken as to both law and fact when as is alleged he made these declarations to Robertson and Thomas. He may have been mistaken as to his rights growing out of the attempted forfeiture, as well as the validity of the sale. Plaintiffs in error again attempt to shift this burden of proof upon the person whose rights are sought to be forfeited as to the things absolutely essential to establish forfeiture. The recital in the notice of forfeiture is not *prima facie* evidence of anything. The first essential is proof by competent evidence that Johns was the co-owner. A mine under the statutes of New Mexico is real estate. It was for the plaintiffs in error to show this. We have shown, as the court below points out, that the record shows Johns was not the owner, but Apex Mining Company.

VI.

On page 9 of his supplemental brief counsel for plaintiffs in error seems to contend that objections to the sheriff's notice of sale, sheriff's deed, etc., are not open to attack, because they are mere irregularities, and are all cured by the

assertions that the court had jurisdiction, and thereafter no objection is available. He does not seem to recognize that a suit by attachment without personal service of process on the defendant is a purely statutory proceeding. Without the statute there could be no attachment. We quote in this connection as follows (70 Fed. Rep., 346):

In *Murray vs. American Surety Company of New York*, 70 Fed. Rep., pp. 341, 346, the court said (p. 346):

> "Courts do not make the laws. They interpret "them. If there is no warrant in the statute for the "doing of an act, courts cannot supply the defect. "There is nothing in the contention of counsel for "plaintiff in error that will 'justify us in interpolat- "'ing into the statute something that the legislature "'has omitted' (*People's Sav. Bank. v. Superior "Court of San Francisco*, 103 Cal., 33, 36 Pac., "1015). In whatever light this question may be "viewed, we are brought directly face to face with "the unquestioned rule of law that in all special "statutory proceedings the measure of the court's "power is the statute itself (See authorities before "cited; *Smith v. Westerfield*, 88 Cal., 374, 26 Pac., "206; *East Tennessee, V. & G. R. Co. v. Southern "Tel. Co.*, 112 U. S., 306, 5 Sup. Ct., 168; Wells, "Jur., sec. 70; High, Rec., sec. 43. Whatever steps "are provided for by the statute may be taken by the "court, and, no matter how irregular or erroneous "its action may be in regard thereto, it is conclusive "until reversed upon appeal, and cannot be collat- "erally assailed (*Dowell v. Applegate*, 152 U. S., "327, 340, 14 Sup. Ct., 611, and authorities there "cited). But the judgment of a court having no "jurisdiction of the subject-matter or the parties, or "the exercise of a power by the court not authorized "by the statute in purely statutory proceedings, is "utterly null and void, and may be collaterally as- "sailed (*Griffith v. Frazier*, 8 Cranch, 9; *Elliott v. "Piersol*, 1 Pet., 333, 340; *Wilcox v. Jackson*, 13 "Pet., 498, 511; *Bigelow v. Forrest*, 9 Wall., 351; "*Windsor v. McVeigh*, 93 U. S., 274, 282; *U. S. v.*

" *Walker*, 109 U. S., 258, 3 Sup. Ct., 277; *Reynolds*
" *v. Stockton*, 140 U. S., 254, 268, 11 Sup. Ct., 773;
" *Hatch v. Ferguson*, 15 C. C. A., 201, 68 Fed., 45;
" *Munday v. Vail*, 34 N. J. Law, 419)."

VII.

On page 13 of his supplemental brief counsel attempts to evade the effect of Brant *vs.* Virginia Coal, etc., Co., 93 U. S., 326, by quoting from the opinion the declaration, it does not appear that the parties sought to be estopped ever made any representation to induce the purchaser to buy the property, etc. Nothing can be found in this record to show that Dye ever uttered a word, did, or omitted to do a thing that was knowingly intended by him to induce Heineman and Crary to complete the purchase. Dickson *vs.* Colgrove, 100 U. S., 578, is cited on this proposition. In this case the declarent knew his rights and deliberately disclaimed them, knowing that others would act upon the disclaimer. Dye did not know the facts or his rights, and he was not informed, and had no reason to believe the purchasers were acting upon his declarations or his silence.

The citation (pages 15 and 16) of the brief does not sustain the proposition. It is another attempt to shift the burden of proof.

In Conclusion.

Taliaferro, the purchaser at the sheriff's sale, conveyed this five-sixths interests to H. C. Crary and Eugene Heineman on the first day of October, 1900 (Record, page 91, folio 137). The complaint was filed December 28th, 1900 (Record, pages 29 and 30). Heineman and Crary, Taliaferro, Paul Meyer, and Charles Spence were made defendants.

It does not appear from the documentary or oral evidence that at the time suit was brought any of the defendants had any title or were in possession except Heineman and Crary.

Before the second trial in the District Court Heineman died. His death was suggested before the trial progressed (Record, page 54, folio 80). Before his death, and long after the litigation was flagrant, he conveyed his interest to the defendants, Charles Spence, Joseph E. Spence, and Jones Taliaferro (Record, pages 94 and 95). While H. C. Crary was still a party to the record and a nominal defendant, he conveyed his interest to the defendants, Jones Taliaferro, Charles Spence, and Joseph E. Spence (Record, page 93).

We call the attention of the court especially to pages 193, 194, and 195 of this record, and quote the same as follows:

> "JONES TALIAFERRO, one of the defendants, testifies as follows:
>
> "Q. You stated that yourself, H. B. Ferguson, Charles Spence, Paul Mayer, and Van Schroick are now interested in this mine; is anybody else interested in it besides these persons.
>
> "A. Not to my knowledge.
>
> "Q. Crary and Heineman then have no interest in it at the present time?
>
> "A. None whatever.
>
> "Q. I will ask you if you acquired your interest by quit claim, certified copies of which I have shown you?
>
> "A. Yes, sir.
>
> "Q. And the other claimants in there, Charles Spence, and J. E. Spence acquired their interest the same way, did they, under these two deeds?
>
> "A. Yes, sir; I think so; I just glanced at the headings of those deeds.
>
> "Q. One of these deeds bears date of the 28th day of March, and the other bears date of the 5th of July, 1901. I will ask you if that is the date when you acquired the interest, or did you acquire it before that time?
>
> "A. I think those are the deeds.
>
> "Q. That was after this suit was brought?
>
> "A. Yes, sir.
>
> "Q. You and Charles Spence and J. E. Spence all had notice of the pendency of this suit at the time that you took these deeds did you?

"A. I knew about it.
"Q. Well, didn't they know about it?
"A. I think so. As to Charles Spence, I am certain he knew about it.
"Q. Didn't you tell him about it?
"A. Yes, sir, we talked about it."

Witness then proceeds and states that Mr. Ferguson acquired his interest after the suit was brought and that they made him the deed for it, and also states that Van Schroick, the other party said to have interest, acquired his interest under these two quitclaim deeds made by Heineman and Crary. The deeds are found in the record on pages 195, 196, and 198, conclusively showing that the title of the property had passed by reconveyance from Heineman and Crary to Jones Taliaferro and the two Spences after the suit was brought with full knowledge of the pendency of the suit, and that the other two claimants who are not parties to the suit, Ferguson and Van Schroick, acquired their interests through the grantees in these quitclaim deeds after the suit was brought. The appeal in this case is taken only by the parties to the record, including Crary, and those parties took title with full notice of the suit and during its pendency and can certainly not rely upon the doctrine of estoppel invoked in this cause; that is, that Joseph and Charles Spence and Jones Taliaferro, as will be seen from the inspection of the judgment, and Crary, who had no interests at the time of the rendition of the judgment, are the only parties plaintiff to this writ of error.

Thus it will be seen that the defendants against whom this judgment is effected purchased their interest in this mining claim with their eyes wide open; they were neither deaf, dumb, nor blind. It seems to us that the issues before this court are narrowed down to the single proposition—that proposition is whether there was a valid or void sale. If notice was necessary to jurisdiction, and there was no notice, it was void. If a writ is necessary to seizure, and there is no authority for an alias writ, there could be no seizure. No

seizure jurisdiction under the extremest construction that can be given to Cooper *vs.* Reynolds; no statute can cover jurisdiction on a court over either person or property by the mere act of filing papers with a clerk of a court. There is no law for this transfer of rights growing out of the doctrine of estoppel, as if the claimant or rights under such transfer was an endorsee of a promissory note for value, without notice before maturity.

Respectfully submitted.

W. B. CHILDERS.

Corrections of Citations in Original Brief.

Cases cited from other than the original report referring to different pages of the brief as follows:

Brief, page 58. State *vs.* Noblett, 47 Atlantic, 438; Official Report, Watson *vs.* Noblett, 65 N. J. L., 506-510.

Brief, page 60. Freyer *vs.* McNoughton, 67 N. W., 978; 110 Mich., 22.

Brief, page 61. Nance *vs.* Barber, 26 S. W. Rep., 151; 7 Tex. Civil Appeals, 111.

Brief, page 80. Clark *vs.* Parsons, 39 Atlantic, 900; 69th N. H., 147; Williams *vs.* McGee, 13 S. E., 84; Official Report, 86 Ga., 764.

Brief, page 89. Trevaskie *vs.* Peard, 44 Pac., 246; 111 Cal., 599; Mills *vs.* Fletcher, 34 Pac., 637; 100th Cal., 142; Utah M. & M. Co. *vs.* Dickert, 21 Pac., 1002; 6 Utah, 184.

CRARY v. DYE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 103. Argued January 13, 14, 1908.—Decided February 24, 1908.

The views of the territorial courts are very persuasive on this court as to the construction of local statutes.

This court holds, following the construction by the Supreme Court of New Mexico of the statutes of that Territory, that there is no authority in New Mexico for the issuing of an alias writ of attachment, and that levying upon property under such a writ gives the court no jurisdiction thereover, and the purchaser acquires no title through sale under such a levy.

One claiming to have been influenced by the declarations or conduct of another in regard to expending money on real estate must, in order to assert estoppel against that person, not only be destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge in regard thereto; where the condition of the title to real property is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.

One whose mining property was sold under a void attachment *held* in this case not to have been estopped from asserting his title to the property as against the vendee from the purchaser at the sheriff's sale by reason of statements made by him to such vendee prior to the final payment.

Held also in this case that the actions and declarations of the owner of a mining claim sold under a void attachment did not amount to an abandonment of his claim so that he could not reassert his title to the property as against the purchaser at the sale or his vendee.

78 Pac. Rep. 533, affirmed.

THE facts are stated in the opinion.

Mr. H. B. Fergusson, with whom *Mr. Elfego Baca* was on the brief, for plaintiffs in error.

Mr. W. B. Childers for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action of ejectment for certain mining ground in the Territory of New Mexico. Plaintiffs in error claimed title by virtue of a sheriff's sale in proceedings against Dye, one of the

defendants in error, reinforced by certain declarations of the latter, which, it is contended, constitute an estoppel against him to assert the invalidity of the sale or claim of title thereunto. There have been two trials of the action. The first resulted in a verdict for plaintiffs in error, which was reversed by the Supreme Court of the Territory. 78 Pac. Rep. 533. The second trial resulted in a judgment for defendants in error, which was affirmed by the Supreme Court. This writ of error was then sued out.

The validity of the sale and an estoppel, based on the facts hereinafter referred to, were relied on by plaintiffs in error at the first trial, and they secured a verdict by the instructions of the court. The Supreme Court of the Territory reversed it, adjudging the sale to be invalid on the ground that an alias attachment was not authorized by the laws of the Territory. 78 Pac. Rep. 533. On the second appeal the court refused to review this decision, holding it to be the "law of the case," and not open to further review. It confined its consideration to the question of estoppel and decided the question adversely to the contention of plaintiffs in error, and affirmed the judgment against them. This writ of error brings up both questions, which we will consider in their order.

1. The statutes of the Territory distinguish between original and ancillary attachments. Sections 2686 and 2721 of the Compiled Laws of New Mexico. There is no provision for an alias attachment, and it was hence concluded by the Supreme Court of the Territory that an alias attachment was not authorized, and that a judgment dependent thereon was void and could be attacked collaterally. The procedure in attachment is provided for in chapter II of the Compiled Laws of New Mexico, §§ 2686 to 2737, both inclusive. A summary of the applicable sections is inserted in the margin.[1]

[1] SEC. 2686. Creditors whose demands amount to $100 or more may sue their debtors in the District Court by attachment, when, among other cases, the debtor is not a resident of or does not reside in the Territory, or has concealed himself, or absconded, or absented himself from his usual place

There is no provision for an alias attachment, and we think the implication of the statute is against it, certainly against it except upon filing a new affidavit and bond and a new publi-

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of abode, "so that the ordinary process of the law cannot be passed upon him."

SEC. 2690. A creditor wishing to sue his debtor by attachment may place in the clerk's office a petition or other "lawful statements" of his cause of action and file an affidavit and bond, and thereupon he "may sue out an original attachment" against the property of the debtor.

SEC. 2691. An affidavit must be made by the plaintiff, or by some person for him, stating that the defendant is indebted to plaintiff and the amount of the indebtedness and on what account, and the existence of one or more of the causes mentioned in section 2686.

SECS. 2692, 2694. A bond shall be executed by the plaintiff, the penalty of which and the sufficiency of the sureties shall be approved by the clerk, and shall be conditioned that the plaintiff shall prosecute the action without delay, and with effect, and, to quote from the statute "refund of sums of money that may be adjudged to be refunded to the defendant or garnishee by reason of *this attachment*, or any process of judgment thereon." The clerk is directed to indorse his approval on the bond "and the same, together with the affidavit and petition or other lawful statement of the cause of action, shall be filed before an attachment shall be issued."

SECS. 2696, 2697. Original writs of attachment shall be directed to the sheriff of the proper county, commanding him to execute the same, "with a clause of the nature and to the effect of an ordinary citation, to answer the action of the plaintiff." And shall be issued and returned in like manner as ordinary writs of citation, and when the defendant is cited to answer the action the like proceedings shall be had between him and the plaintiff as in ordinary actions or contracts, and a general judgment may be rendered for or against the defendant.

SEC. 2701. When the defendant cannot be cited and his property and effects shall be attached, if he do not appear and answer to the action at the return term of the writ, within the first two days thereof, the court shall order a publication to be made, stating the amount of the plaintiff's demand and notifying him that his property has been attached, and that unless he appear at the next term judgment will be rendered against him and his property sold to satisfy the same. Publication in a newspaper is directed.

Section 2702 enlarges section 2701, and provides that the law of the Territory in regard to attachments is so amended that where the defendant cannot personally be served with the process and shall have no place of residence in the Territory, and the property of the defendant shall have been attached in time to make the necessary publication as now required by law, the officer executing the process, or the agent or attorney of the plaintiff in the case, is authorized to make publication of notice to the de-

cation of notice. We have seen that an affidavit and bond are required and the proceedings are that when a defendant cannot be cited and his property shall be attached, if he did not appear within the first two days of the return term of the writ the court shall order publication to be made stating the amount of the demand, that his property has been attached and that unless he appears at the next term judgment will be rendered against him and his property (property attached, § 2703) sold to satisfy the same. In other words, the attachment must precede the publication and constitutes the ground of publication. The summons to the defendant is through his property and does not extend beyond it. The only consequence of his default is the sale of the property attached—not some other property or property attached subsequently to publication. The publication cannot be ordered until the execution of the writ of attachment and its return. Section 2701. And to the same effect, as we have seen, in § 2702.

It is, however, contended by plaintiffs in error that subsection 24 of § 2685 prescribed the procedure of publication of summons, not §§ 2701, 2702, and that subsection 24 provides that upon filing a sworn pleading or affidavit showing cause for

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fendant in such attachment in the manner prescribed by law, which shall have the same force and effect to compel the appearance of the defendant as if such publication had been in conformity to an order of the court, and upon proof of the publication being made to the court plaintiff may proceed in the case as if the process had been served personally upon the defendant.

SEC. 2703. Judgment by default may be entered, but the judgment shall only bind the property attached.

SEC. 2707. A defendant may contest the truth of the affidavit, and if he succeeds the action is dismissed.

SECS. 2713, 2714, 2715. Where the debt exceeds the sum of $100 the creditor has an election of suing out the attachment, either from the district court or from the probate court of the county in which the suit is brought, by filing affidavit and bond with the clerk of such court. The form of the affidavit and bond is given, and it is required in its condition to recite "that, whereas the above-named A. B. has this day sued out an attachment," etc. Ancillary attachments are provided for in section 2721, and may be issued in a pending suit "when the summons against the defendant has been returned Executed."

publication the clerk shall give notice of the pendency of the action in some newspaper published in the county where the action is pending, which notice shall contain the names of the parties to the cause, the court in which it is pending and a statement of the general objects of the action, and shall notify the defendant that unless he enters his appearance before the day named therein judgment will be rendered against him by default. If this contention be true it is difficult to account for §§ 2701, 2702, and the scheme provided for the commencement of actions by attachment. Nor do we think the contention is supported by the fact that by subsection 175 of § 2685 it is provided that the act "shall not affect actions of replevin or writs of attachment, except as to the form of action," and the amendment subsequently made excepting from the operation of § 2685, "proceedings by attachment." The amendment was made, no doubt, to put the meaning of § 175 beyond any controversy. Besides, subsection 179 provides that "the former practice in law and equity shall be retained in all cases and proceedings not comprehended within the terms and intention of this code."

But even if plaintiffs in error be right about subsection 24, an alias attachment would not thereby be justified. The Supreme Court of the Territory has expressly decided that an alias attachment is not authorized, and we have recently decided that the views of the local courts are very persuasive of the construction of the local statutes.

In the pending cause a petition in the attachment suit was filed in the District Court of the county of Lincoln on the fifth of March, 1898, and on the same day an affidavit was filed stating that the defendant could not be served "in the ordinary way or in any way except by publication." A writ of attachment was issued on the eighth of March. The sheriff made his return thereon on the sixteenth, certifying that he had levied upon and attached certain real estate, which was described, and "that the defendant, Benjamin H. Dye, is not in my county and supposed to be in the State of Ohio."

The record shows an alias attachment issued on the eleventh of May, 1898. The return of the sheriff shows that the alias writ came to his hands on the twenty-seventh of May, and that he levied the same on the twenty-eighth of May, on the mining claim now in controversy.

The first publication of the notice was on the seventeenth of March, 1898, and the last on the fourteenth of April, 1898. Pasted to the affidavit stating those facts is a paper headed "Notice of Suit," by which Benjamin H. Dye is notified "that a suit of assumpsit by attachment has been commenced against him," and that unless he enter his appearance on the fourth of June, 1898, judgment would be rendered against him in said cause by default. The record contains no other publication or notice, but it leaves no doubt that it was upon that publication the default of the defendant was based. This is established by the motion for judgment, filed by the attorney in the case, which alleges service by publication and that the appearance day was June 4, 1898. This motion was filed August 19, 1898, but proof of publication was not filed until December 31, the day judgment was taken. The judgment recites that the cause coming on to be heard, "it is considered that the defendant is in default for failure to answer, and, therefore, the court hears the evidence of plaintiff and assesses the damages on the two causes of action contained in the complaint at $143. And the court finds that the grounds of attachment are well taken and true in effect, and the defendant, having failed to deny same, it is ordered by the court, considered and adjudged that the attachment herein be sustained."

The record shows only one affidavit and bond, but it is contended by plaintiffs in error that even if it be considered necessary that another affidavit and bond should have been filed to justify the alias writ it must be presumed that they were filed in the absence of evidence to the contrary; that the mere silence of the record is sufficient. To support the contention *Voorhees* v. *United States Bank*, 10 Pet. 449, and *Cooper* v. *Reynolds*, 10 Wall. 308, are cited. But if a presumption may

be entertained as to another affidavit and bond a presumption cannot be entertained that another publication succeeded the alias attachment. The record shows the reverse. The publication was complete before the alias attachment was issued, and, therefore, the attachment referred to in the notice was the first attachment, not the alias attachment. As we have said, the attachment must precede the publication. The attachment virtually commences the action, the publication is the summons to the defendant, giving the court jurisdiction to apply the property attached to the satisfaction of the plaintiffs' demand. It follows, therefore, that the court had no jurisdiction to render the judgment relied on and that the plaintiffs in error acquired no title through sale under it.

2. The principle of estoppel is well settled. It precludes a person from denying what he has said or the implication from his silence or conduct upon which another has acted. There must, however, be some intended deception in the conduct or declarations, or such gross negligence as to amount to constructive fraud. *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326; *Hobbs* v. *McLean*, 117 U. S. 567. And in respect to the title of real property the party claiming to have been influenced by the conduct or declarations must have not only been destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. *Brant* v. *Virginia Coal & Iron Co.*, *supra*. These principles are expressed and illustrated by cases in the various text books upon equitable rights and remedies. Does the conduct relied upon in the case at bar satisfy these principles?

The property was sold by the sheriff February 18, 1899, to Jones Taliaferro. On June 5, 1900, he leased the property to H. C. Crary and E. Heiniman, giving them an option to purchase. They went into possession and discovered by their labor upon the property a vein of rich gold-bearng ore in June

and later in August. They subsequently purchased the property under their contract, paying therefor the sum of $1,500. Dye returned to the Territory in the latter part of April, 1899, but took no steps to ascertain the condition of the attachment proceedings—indeed assumed or believed them to be valid, for he declared to several persons that his interest in the property had gone to pay a debt and that he considered it well sold. One of the persons to whom he made the declarations communicated them to Crary and Heiniman. And on the twenty-fifth of October, Mr. Heiniman testified that Dye visited the mine, "and while there, in the presence of Mr. Alexander and Mr. Crary, I told him that I was about to make the payment for the property in full, and I asked him if he knew of any conflicting claim or any other claims on the Compromise. He immediately answered there was. The Scranton claim on the west took off one hundred feet, and he said as to other claims there would be nobody but myself. And he says I have allowed all my time to lapse and I have no claim whatever. With that he wished me success, and hoped that it would prove to be a good mine. He says if it does, it is bound to benefit me, because I own an interest in the Little Nell claim, just north of you, which is only 155 feet north of the Compromise shaft."

To these statements the witness said he expressed his gratification that all were working "in harmony in the camp," and that Dye remarked further: "I wish you the best. I hope you will make a million." And he testified that if Dye had told him not to make payment under his contract, or that he was going to try to recover the mine, the witness would not have made the payment. And further, he first learned of Dye's intention to make a claim by the service in the suit of the papers by the sheriff, and that Dye had not in any of his visits intimated that he had a claim against the mine, or of his intention to assert a claim or give warning of any suit. "He always expressed himself, while visiting the mine, that it was one of the brightest prospects in the camp and that he was glad" that witness was one of the owners. Crary also testified

to conversations with Dye, the first being a few days after ore was "struck" in the mine, although witness had seen Dye frequently and Dye knew witness was working the mine. This conversation need not be given at length. It took place while witness was showing Dye the mine and the work which had been done preceding the discovery of ore. Dye said that he had owned the property, knew of the ore in the mouth of an old tunnel, "and had taken ore out of it, but did not regard it of sufficient value to warrant working it; that he had allowed his time to expire," and hoped that witness and Heiniman would do well on it; "that he made no claim to it, as he owned the property on the other side of the gulch; and if they could get good ore there it would make his Little Nell property more valuable." And the witness said: "I felt elated over the discovery of this ore, and both of us talked a good deal and both of us felt good." In corroboration of Heiniman the witness testified:

"Mr. Dye was there, and Mr. Heiniman asked him, I can hardly remember the exact words, but in substance whether the title to this property, the Compromise mine, was all right. Mr. Dye replied that there was some drawn ground between it and the Scranton, and it on the side that would belong to the Scranton. It was an overlap; that there could be no other claimant, unless it was him, and he had allowed his time to lapse and made no further claims to the property. He also added, 'I hope you will do well with the property, and make lots of money out of it.' "

He further testified that he did not think he would have completed the payment for the property if he had learned at that time that Mr. Dye expected to assert any claim to it, and further; "We done the work, and paid the payment on the repeated assurance of Mr. Dye that he made no claim to it, and would not have touched the property in the first place had we known that he made a claim or had a claim." The conversation between Dye and Heiniman has some corroboration from one of the employés of the mine who was working nearby.

It is manifest that Dye took for granted that the attachment proceedings were good and, indeed, declared it—declared it before the discovery of gold on the claim—declared it afterwards when he knew that Crary and Heiniman were expending considerable sums of money upon the claim and had money yet to pay upon it. Such declarations were natural enough before the discovery of gold; they were not natural after the discovery of gold—a discovery which apparently proclaimed the mine to be one of great richness. Let it be conceded, therefore, that his inattention to his rights was grossly negligent; that his admissions of their loss were grossly negligent, and so far might satisfy one of the conditions of estoppel. But another, and the consummating condition, is that Crary and Heiniman must have been without equal means of information. This, however, was not their situation. They had means of information equal to those of Dye, and nothing was purposely done or said to divert them from inquiry. The only source of information was the record, and that they had examined and took legal advice upon its sufficiency. They testify, however, that they also relied upon the declarations of Dye, as well as the advice received, and that they would not have expended what they had expended (four or five thousand dollars) or made the final payment ($1,500) but for those declarations. The letter of this testimony must be weighed against other considerations. The declarations of Dye were but the expression of an opinion of the legal effect of the attachment proceedings, made strong, perhaps, from the right he had to attack the proceedings directly, but it is hard to think Dye's declarations were as determinative as other considerations.

The lease and option to purchase the mine were not induced by anything done or said by Dye. In taking them Heiniman and Crary acted upon their own judgment, based upon the prospects or chance of value, and their judgment was luckily or skillfully exercised. Within a few days ore was discovered. In the latter part of August the "big strike" was made that demonstrated the mine to be of great value. This value must

be considered in estimating the relative strength of the inducements upon which Crary and Heiniman acted. When they took the lease and option to purchase the mine it was considered by Dye as worth no more than his debt to Taliaferro, to wit, $112 and the costs of the attachment suit. Taliaferro would have been glad to have taken $500 for it, Heiniman testified. At the time this suit was brought, December, 1900, six months after the lease, it was worth $100,000, according to Heiniman's testimony; $50,000 or $60,000 according to other estimates. This value they might acquire by the payment of $1,500. They would certainly lose it if they did not make such payment. The case, therefore, is very simple. It is a case of mining property bought upon speculation and title to which came through a sheriff's sale, the validity of which sale was either assumed or risked; the development of the mine undertaken in like speculation, but continued in certainty of reward within three days by the discovery of what Heiniman calls in his testimony "the large ore—the pay ore chute." Whether this was the real discovery or that of August following which finally revealed the richness of the mine, matters not. Within a few days there was evidence of value and inducements to the expenditures testified to. Within four months a property which was sold for a few hundred dollars was estimated by mining experts to be worth $100,000. Such inducement existing for Heiniman and Crary to complete their contract, we are asked to believe that they were misled by the declarations of Dye to action detrimental to their interest. We are unable to yield to the contention. That they felt satisfaction at the declarations may be. That they labored an extra day or spent an extra dollar upon the faith of them the record fails to establish.

Another contention remains to be noticed. Dye owned five-sixths of the mine; the other one-sixth was owned by the Apex Gold Mining Company. Dye did not do the assessment work upon the mine for 1898, and the work was done by the mining company. There was an attempt at forfeiture of Dye's interest, but the notice of publication was not given by the mining com-

pany but by one T. C. Johns, who described himself as coöwner with Dye. Johns was the manager of the company. Subsequently Taliaferro paid to one T. R. Walsh for Johns Dye's proportion of the expenditure for the work. Dye did not do or offer to do any assessment work for 1898.

Upon these facts plaintiff in error seemed to have contended in the Supreme Court of the Territory that Dye had forfeited his rights to Johns, considered as coöwner with Dye, and that Taliaferro by paying Johns became substituted to his rights. To this contention the Supreme Court made answer that a forfeiture had not been effected, because Johns was not a coowner with Dye, but that the Apex Mining Company was, and that the company had not given notice of forfeiture. Plaintiffs in error now change their contention or the form of it. They now contend that after Taliaferro purchased the property at sheriff's sale, and before the forfeiture occurred under the advertisement against Dye by his co-tenant Taliaferro paid to the coöwner or its agent the amount claimed, and thereby protected himself under § 3126 [1] of the Compiled Laws of New Mexico, 1897, and ended also Dye's interest. But this contention involves again the validity of the sheriff's sale and the attitude of Dye to the sale. Besides, the liability for the assessment work had not taken the form of a lien.

It is further contended that an undivided interest in a mining claim can be abandoned, and that Dye's acquiescence in the sheriff's sale constituted an abandonment of the claim and an election to accept the sale as a disposition of his property. We do not concur in the view that Dye's acts constituted an abandonment of his claim.

Judgment affirmed.

[1] When any property shall be sold subject to liens and encumbrances, the purchaser may pay the liens and encumbrances and hold the property discharged from all claims of the defendant in execution; but the defendant may redeem the property within one year after the sale thereof, paying to the purchaser, his heirs or assigns, the purchase money with interest. When redeemed, the purchaser shall have the growing crops and shall not be responsible for rents and profits, but he shall account for wastes.